THE

REPORTS

OF THE MOST LEARNED

SIR *EDMUND SAUNDERS*, KNT.

LATE LORD CHIEF JUSTICE OF THE KING'S BENCH,

OF SEVERAL

PLEADINGS AND CASES

IN THE

Court of King's Bench,

IN THE TIME OF THE REIGN OF

HIS MOST EXCELLENT MAJESTY KING CHARLES THE SECOND.

WITH THREE TABLES:

The First, of the NAMES of the CASES; the Second, of the Matters contained in the PLEADINGS; and the Third, of the Principal Matters contained in the CASES.

THE FOURTH EDITION.

WITH NOTES AND REFERENCES TO THE PLEADINGS AND CASES,

By JOHN WILLIAMS,

SERJEANT AT LAW.

IN TWO VOLUMES.

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THE SECOND PART.

Case 1.

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Mellor *verſus* Walker.

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MELLOR v. WALKER.

Derbyſhire, to wit. } BE it remembered, that heretofore, to wit, in *Eaſter* term laſt paſt before our lord the king at *Weſtminſter*, came *Henry Mellor*, gent. by *Alured Motteram*, his attorney, and brought here into the court of our ſaid lord the king, then there, his certain bill againſt *Edward Walker*, of *Derby*, in the county of *Derby*, gent. in the cuſtody of the marſhal, &c. of a plea of treſpaſs, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words: (1) that is to

Memorandum.

(1) The original deſign and eſtabliſhment of the court of K. B. was to determine criminal matters, frauds, and breaches of the peace. If, however, any one had a cauſe of action againſt an attorney or officer of the court, or againſt a perſon in the actual cuſtody of the marſhal, for ſome matter within it's juriſdiction, he could not ſue him elſewhere, but was obliged to proceed in that court by exhibiting a bill againſt him, Bro. Bille 6. 31. 4 Inſt. 71, 72. The bill was the commencement of the action, being conſidered as an original writ, *Cowp.* 455. *Foſter* v. *Bonner*; and contained the cauſe of complaint. And as ſuch proceeding was only the occaſional buſineſs of the court, it was prefaced with a memorandum, or note, for the purpoſe of reminding the court that a civil action was depending. But in the court of C. B. which was inſtituted for the deciſion of civil ſuits, and whoſe juriſdiction is in ordinary caſes founded upon an original writ iſſued out of *Chancery*, the proceedings are not entered

MERLOR v. WALKER.

Declaration in treſpaſs clauſum fregit.

to ſay, *Derbyſhire*, to wit, *Henry Mellor*, gent. complains of *Edward Walker*, of *Derby*, in the county of *Derby*, gent. being in the cuſtody of the marſhal of the *Marſhalſea* of our lord the king, before the king himſelf, for that he, on the 1ſt

tered under a memorandum, but the form is, to begin with a recital of the writ on which the action is founded, and proceed with the declaration and other pleadings to the iſſue, in this manner: "*Hilary Term* in the 38th "year of the reign, &c. *Middleſex*, to "wit, A. B. was attached to anſwer C. "D. of a plea of treſpaſs upon the "caſe. And whereupon, &c." and the form in the ſame in the K. B. when the ſuit is by original. See 1 Saund. 339. However the attornies and officers of the court of C. B., or to ſpeak more correctly, the court on their behalf, claimed a privilege that they too ſhould be ſued only in their own court by bill, and not by original. And this proceeding, being the occaſional, and not the ordinary, buſineſs of that court, was alſo headed by a memorandum in like manner, and for the ſame reaſon, as in the proceeding by bill in the court of K. B.

At firſt, it ſeems, a bill could not be filed except in term time; afterwards it was allowed to be filed in vacation, intitled as of the preceding term, againſt any who was in the ſuppoſed cuſtody of the marſhal, that is, againſt all perſons but priſoners and attornies; for in proceſs of time the court of K. B. acquired a juriſdiction over all civil actions, by ſuppoſing the defendant to be in the cuſtody of the marſhal, and ſtating him in the bill to be ſo. With reſpect to priſoners in the *actual* cuſtody of the marſhal, it continued to be a rule of the court of K. B. for a long time, that no bill could be filed or declaration delivered againſt them in vacation. *Eaſt.* 17 *Geo.* 2. *Holloway* v. *Croſs*, cited per *Deniſon*, Juſtice, in 2 Burr. 1051, 1052: and ſo it had been held before in 6 Mod. 254, 255. *Tilſden* v. *Parſriman.* S. C. 1 Salk. 213. 345, where it is ſaid, that there was no way to charge a defendant in cuſtody in vacation, but by making an entry in the marſhal's book in the king's bench office, that he ſhould remain in cuſtody at the ſuit of the intended plaintiff; which was ſufficient to charge him, provided he were then in actual cuſtody; for if he were at liberty, he might be arreſted. But in the caſe of *Hutchins* v. *Kenrick*, 2 Burr. 1048. 1052, where this matter was fully conſidered, the court held, that the right method of charging a perſon in cuſtody with a new ſuit in vacation, is to file a bill as of the preceding term, and to deliver to, or leave for, the defendant being in cuſtody, a copy of the declaration as of the preceding term, *and to make an affidavit thereof.* However, it does not ſeem neceſſary, nor is it the preſent practice, to make an affidavit of the delivery of the declaration when the defendant is in actual cuſtody. And a declaration may be delivered againſt a priſoner in vacation, by the *ſame plaintiff* who had arreſted the

1ſt day of *April*, in the 21ſt year of the reign of our lord *Charles* the 2d, now king of *England*, &c. with force and arms, broke and entered the cloſe of him the ſaid *Henry*, called

the defendant. 8 Term Rep. 643, *Heron* v. *Edwards*. So with reſpect to attornies, it was a rule of the court of K. B. that a bill could not be filed againſt an attorney or officer of the court in vacation. The reaſon aſſigned was, becauſe a bill could only be filed againſt a privileged perſon *when preſent in court*, which is in term time, and not in vacation. 12 Mod. 163. *Broadwaite* v. *Blackerby*. S. C. 2 Salk. 544. Comb. 465. and *Holloway* v. *Croſs* above cited, and certainly the form of the bill is ſo. 1 *Saund.* 28. 202. Poſt 415. This rule continued to exiſt much longer than the other reſpecting priſoners: at length the inconveniences and miſchiefs which attended it induced the court to put an end to it. For in many caſes an attorney could not be ſued at all, and the debt would be unpaid, unleſs a bill could be filed againſt him in vacation; as where the ſtatute of limitations would attach before the commencement of the term. So where in penal ſtatutes the action muſt be brought within three months, it might happen that the time would begin and expire before the term. So if an attorney were an acceptor of a bill of exchange payable the day after the end of *Trinity* term, the holder of the bill had no remedy, but was obliged to wait four months before he could compel payment of the money. The rule ſeems firſt to have been relaxed, to prevent an attorney from taking advantage of the ſtatute of limitations; and at laſt it was fully ſettled, that a bill may in *all* caſes be filed in vacation againſt an attorney, as well as any other perſon. Doug. 312. 3d edit. *Comerford* v. *Price*. Ibid. 313, note 84. *Lane* v. *Wheat*. 5 Term Rep. 173. *Waghorne* v. *Fields*. And without doubt the ſame rule holds in the court of C. B. But ſtill the bill muſt be *intitled* as of the preceding term, and of courſe appears to be filed of the preceding term. Therefore if the cauſe of action aroſe in the vacation, and appears upon the record to have accrued ſubſequent to the filing of the bill, it would be bad. As where a bill was filed in the vacation after *Michaelmas* term againſt an attorney, as acceptor of a bill of exchange payable on the 13th of *December*, intitled of *Michaelmas* term preceding; the defendant demurred, ſhewing for cauſe that the bill was filed before the action accrued, and the court held the demurrer good, but gave the plaintiff leave to amend his bill. The amendment was dictated by the court, and was as follows: "*Michaelmas* term, in the 33d "year of the reign of *King George* the "Third, (*Middleſex*, to wit) Be it re- "membered, that on the 14th day of "*December*, (a day after the cauſe of "action accrued,) A. D. brought into "the office of the clerk of the declara- "tions of the court, according to the "courſe and practice of the court, his "certain bill againſt W. B. gent. one, "&c. and filed the ſame bill as of "*Michaelmas* term in the 33d year of "the reign, &c. which ſaid bill follows "in theſe words." This form will be

 found

MELLOR v. WALKER. called *Littlefield*, at *Derby*, in the county of *Derby*, and with his feet in walking, and with his certain cattle, to wit, horſes, bulls, oxen, cows, ſwine and ſheep, eat up, trod down, and conſumed his graſs to the value of 40s. then and there lately growing,

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found adapted to other caſes; as where a priſoner is charged in vacation upon a cauſe of action which aroſe after the laſt term; the bill, we have above ſeen, muſt be filed of the preceding term, and therefore there muſt be a ſpecial memorandum ſimilar to this.

The *memorandum* alleges the bill to be exhibited of the term in which the declaration is delivered, and the form of it varies according to the fact of the caſe. It is neceſſary to obſerve, that in both courts *the record* is intitled of the term in which the iſſue, whether of law or fact, is joined, without regarding the term which the declaration and plea, &c. may be of. If the cauſe of action has ariſen *within* the term, the memorandum, which when general, relates to the firſt day of the term, and would in this inſtance ſhew the bill to be exhibited before the cauſe of action, muſt be ſpecial, ſtating it to have been filed on ſome particular day in term after the cauſe of action, 1 *Saund.* 40. and the declaration muſt alſo be intitled of the ſame day. And if the iſſue be of the ſame term, inſtead of a particular day in ſome preceding term *laſt paſt*, the memorandum muſt deſcribe it to be *in this ſame term*. If the iſſue be of a term ſubſequent to the cauſe of action, but of the ſame term with the declaration, the memorandum muſt ſhew the bill to have been exhibited on the firſt particular return day of the term, in which the declaration was delivered, and deſcribe it to be *in this ſame term:* as on *Saturday* next, after the morrow of *All Souls*, in this ſame term. Poſt 108. Where the iſſue is of a term ſubſequent to the declaration, and within four terms after, the memorandum is in the form of this entry. And where the iſſue is of a term which is more than four terms after the declaration, the memorandum differs from the preſent in ſubſtituting *the year of the king's reign*, inſtead of the words *laſt paſt*. Poſt. 51.

When it is material to ſhew the true time of the commencement of the ſuit, the evidence of it will in ſome meaſure depend upon the form of the record. As where a penal action muſt be brought within a limited time, the memorandum itſelf without more will often prove the action to have been commenced within the allowed period, tho' the record be intitled of a term long ſubſequent to the delivery of the declaration. But a record of the C. B. does under ſimilar circumſtances ſhew the contrary; and therefore the plaintiff muſt be prepared with the writ to prove the time of the commencement of the action. So it ſometimes happens that a record of the C. B. will be primâ facie evidence of an action having been brought in due time, when the term in the memorandum in the K. B. record would perhaps be fatal. As where in an action by an attorney for his fees, which by ſtatute 2 *Geo.* 2. *c.* 23. *ſ.* 23. cannot be commenced until the expiration of one month after he has delivered his bill, it appeared in evidence on the trial, that

growing, and other wrongs to him did againſt the peace of our ſaid lord the now king, and to the damage of him the ſaid *Henry* of 20l. and therefore he brings ſuit, &c.

MELLOR v. WALKER.

And

that the bill was delivered on the 30th of *September* 1797, and the record, which was by attachment of privilege in the C B., was intitled of *Hilary* term 1798. The learned judge who tried the cauſe, was of opinion, that the plaintiff ought to produce the writ to ſhew that a month had expired before the commencement of the action; and the writ not being produced, the plaintiff was therefore nonſuited. But the court of C. B. ſet aſide the nonſuit, holding that the record was ſuch primâ facie evidence as would, if uncontradicted, ſatisfy the 2 *Geo.* 2; that ſuch evidence might have been contradicted by the defendant, whoſe buſineſs it was to ſhew by the writ, that it was really commenced before the time. And on the other hand in penal actions, which are to be brought within a limited time, the plaintiff is bound to produce the writ to ſhew the commencement of the action within the time, for without it, the record is primâ facie evidence of it's having been brought after; and if the record in ſome inſtances operated againſt the plaintiff, it was reaſonable it ſhould in others operate in his favor; 1 Boſ. & Pull. 263. *Webb* one, &c. v. *Pritchett*. It is often neceſſary to prove the time of the commencement of the action by the production of the writ itſelf, and in ſome actions to plead the time of it's commencement. A bill of *Middleſex* or latitat, may be conſidered by the plaintiff, either as the commencement of the action, or as proceſs to bring the defendant into court, as it beſt ſerves his intereſt. 1 Wilſ. 141. *Wood* v. *Newton*. It is ſettled that a bill of *Middleſex*, or a latitat without a bill of *Middleſex* previouſly ſued out, 1 Sid 53. *Dacy* v. *Clinch*. ibid. 60. *Welden* v. *Greg*. 1 Str. 550. *Holliſter* v. *Coulſon*. 2 Str. 736. *Crokatt* v. *Jones*, is a good commencement of the ſuit in a penal action, or to avoid a tender, or ſave the ſtatute of limitations. 2 Burr. 961. *Johnſon* v. *Smith*. 3 Burr 1243. *Morris* v. *Pugh*. Cowp. 454. *Foſter* v. *Bonner*. Therefore if the defendant plead the ſtatute of limitations *before the exhibiting of the bill*, the plaintiff may reply a latitat ſued out of ſuch a term, and the defendant may rejoin, that the latitat was not in fact ſued out till the vacation after ſuch preceding term, and after the expiration of the time limited for bringing the action. 2 Burr. 950. *Johnſon* v. *Smith*. Sty. 156. *Coles* v. *Sibſye*. So if the defendant plead a tender before the exhibiting of the bill, the plaintiff may reply a latitat previous to the tender, and the defendant may rejoin, that there was no cauſe of action at the time when the latitat iſſued. 1 Wilſ. 141. *Wood* v. *Newton*. So where the cauſe of action appears in *evidence* to have ariſen after the firſt day of term, and there is no ſpecial memorandum, in which caſe, we have above ſeen, the bill by fiction relates to the firſt day of the term, it will be ſufficient for the plaintiff to give evidence of a latitat ſued out after the cauſe of action. 3 Burr. 1241. *Morris* v. *Pugh*. S. C.

MELLOR v. WALKER.

Imparlance.

And now as this day, that is to ſay, on *Monday* next after the octave of *St. Hilary* in this ſame term, until which day the

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1 Black. Rep. 312. Indeed if it appears ſo *upon the record*, it is a fatal objection. But if the cauſe of action be laid on the *firſt day of the term*, it is good, although there is a general memorandum; as where in an action on promiſes, the declaration, which was intitled generally of *Michaelmas* term, ſtated the promiſes and the breach thereof to have been made on the 7th day of *November*, 1785, which was the firſt day of the term, on demurrer to the declaration for this cauſe, it was held well enough, becauſe the term for the purpoſe of delivering the declaration does not begin *till the ſitting of the court*, and the promiſe and the breach might have well taken place before the delivery of the declaration, 1 Term Rep. 116. *Pugh* v. *Robinſon*. It is neceſſary however, that the bill of *Middleſex*, or latitat, ſhould be returned *non eſt inventus* by the ſheriff, and entered upon the roll, and continued from term to term down to the time of ſuing out the proceſs upon which the defendant is actually ſerved. 7 Mod. 5. *Atwood* v. *Burr*. per Holt. C. J. 2 Ld. Raym. 883. *Brown* v. *Babbington*. per Holt. 6 Term Rep. 617. *Harris* v. *Woolford*, and *Bates* v. *Jenkinſon* there cited. 3 Bof. & Pul. 330. Poſt. 63. c. *note*. See the form of entering a bill of *Middleſex* on the roll 1 Inſtruc. Cler. 49. 7 edit. and of entering a latitat ibid. 52, and the form of the replication Lib. Plac. 334. The continuances are mere matter of form, and may be entred at any time; it has even been holden that they may be made by the attornies in their chambers, 1 Sid. 52. *Dacy* v. *Clinch*. 6 Term Rep. 618. If indeed a writ be ſued out within the time limited by a penal ſtatute, and the plaintiff declare within a year after the return of the writ, which by the general rules of law he may do, provided he is not nonproſſed before for want of declaring within two terms, 2 Term Rep. 112. *Worley* v. *Lee*. 3 Term Rep. 123. *Penny* v. *Harvey*, it is not neceſſary to ſhew the writ returned and continued. 7 Term Rep. 6. *Parſons* v. *King*. But in general caſes the *bill* is the commencement of the action, and the *latitat* only proceſs to bring the party into court; and in that view it is held that a latitat may be ſued out before there is any cauſe of action. Cro. Eliz. 271. *Richbell* v. *Goddard*. Cro. Jac. 561. *Pigot* v. *Rogers*. 1 Vent. 28. *Hanway* v. *Morrey*. 8 Mod. 343. *Perry* v. *Kirk*. 1 Wilſ. 142. *Wood* v. *Newton*. 2 Burr. 967. *Johnſon* v. *Smith*. Cowp. 454. *Foſter* v. *Bonner*. Dougl. 62. *Ward* v. *Honeywood*. And the plaintiff may prove a cauſe of action ariſing after the ſuing out of the latitat, and before the filing of the bill, as well in *bailable* as common writs. 7 Term Rep. 4. *Byſt* v. *Wilding*. So where it is a record of the C. B. the production of the writ of *capias ad reſpondendum* is ſufficient proof of the time of the commencement of a penal or other action. And it ſeems ſettled, that the plaintiff may reply a capias, without an original writ firſt ſued out, to a plea of tender, or of the ſtatute of limitations, if it be duly returned, entred and continued,

the ſaid *Edward Walker* had leave to imparl (2) to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter*, comes as well as the ſaid *Henry* by his attorney aforeſaid, as the ſaid *Edward Walker* by *John Chambers*, his attorney; and the ſaid *Edward* defends the force and injury when, &c. and as to the coming with force and arms, or whatever elſe is againſt the peace

Plea.

[2]

tinued, as well as a latitat; for a capias is now conſidered to be the actual commencement of the ſuit in the Common Pleas. 2 Black. Rep. 924, 925. *Leader* v. *Moxon*. S. C. 3 Wilſ. 461. 1 Ld. Raym. 434. *Kinſey* v. *Heyward*. Willes's Rep 255. *Karver* v. *James*; tho' the contrary was holden in 1 Ld. Raym. 553. *Mois* v. *Bruerton*, 2 Ld. Raym. 880. *Brown* v. *Babbington*. See the form of entring the capias on the roll, Imp. Pr. C. B. 631. 4th edit. And if to a plea of tender, or the ſtatute of limitations, the plaintiff reply *an original* ſued out within time, the production of *a capias ad reſpondendum* ſued out within ſix years, is evidence of an *original* having been ſued out, for the court will preſume it. *Goſſing* v. *Witherſpoon*, per Lord *Kenyon*, *Middleſex* ſittings after *Michaelmas* 1788.

(2) The plea appearing on the record to be of a term ſubſequent to the bill, it is neceſſary to continue the bill to the plea; for without a continuance the proceeding will be erroneous, unleſs indeed after a verdict, in which caſe a diſcontinuance is cured by ſtatute 32 H. 8. c. 30. or after a judgment by default, where it is remedied by ſtatute 4 *Ann.* c. 16. But there is no need of continuing the bill down from term to term to the plea, 2 Ld. Raym. 872. *Curlewis* v. *Dudley*. S. C. 1 Salk. 179. Caſ. Temp. Hard. 322. *Fletcher* v. *Richardſon*; for the courſe of the K. B. is to enter an imparlance to the firſt day of the term that the plea is of: which, we have ſeen, is the term in which iſſue is joined, and the record intitled. As where in the memorandum the bill is alleged to be exhibited in *Michaelmas* term, and iſſue is joined in *Trinity*, or ſome other term, following, the imparlance is from *Michaelmas* term to the firſt day of *Trinity*, or other ſubſequent term. If the plea be of the ſame term with the bill, there is not any neceſſity of an imparlance, or continuance. In like manner it is held not to be neceſſary to make an entry of an imparlance on the replication, rejoinder, ſurrejoinder and the like, though in fact delivered of a ſubſequent term, for they are preſumed to be of the ſame term with the preceding pleading. 5 Rep. 75. a. *Wymark's* caſe. Nor is there any continuance entred on the plea in a record of the C. B. or of the K. B. when the proceeding is by original writ; for the declaration and all the other pleadings are ſuppoſed to be of the ſame term.

There is another kind of imparlance, whoſe general ſignification means time given to the defendant to plead, and is either of courſe, or in the diſcretion of the court. Where the proceſs is returnable on the laſt return of the term, or even before that period, but the plaintiff has neglected to deliver, or file his declaration and give notice of his having done

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peace of our ſaid lord the now king, and alſo as to the whole treſpaſs aforeſaid with the ſaid cattle, except with one gelding and one mare of the ſaid cattle, above ſuppoſed to be done, he the ſaid *Edward* ſays that he is not guilty thereof, and of this he puts himſelf upon the country, and the ſaid *Henry* thereof likewiſe, &c. And as to the reſidue of the ſaid treſpaſs with the ſaid one gelding and one mare above ſuppoſed to be done, he the ſaid *Edward* ſays that the aforeſaid *Henry* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays that the ſaid cloſe, and alſo the place in which the ſaid treſpaſs is above ſuppoſed to be done, are, and at the ſaid time when, &c. were, 40 acres of land with

Locus in quo, part of *Littlefield.*

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done ſo, four days excluſive before the end of the term, and the defendant is completely in court, he is intitled by the practice of both courts to an imparlance, and muſt plead within the firſt four days of the following term; and if the plaintiff omit delivering or filing his declaration before the eſſoign day of that term, and giving notice thereof, the defendant will alſo be allowed to imparl to the ſubſequent term. This is called a general imparlance, and *is always to another term.* 6 Mod. 28. *Longvill* v. *Hundred of Thiſtleworth;* after which the defendant can only plead in bar, and is not permitted to plead in abatement, or any dilatory plea. 12 Mod. 529. *Anon.* He is not allowed to demand oyer of a deed; Bro *Oyer.* 14. 6 Mod. 28. Gilb. C. B. 184. 3d edit; for oyer cannot be had but during the ſame term in which the deed is brought into court. 5 Rep. 74. *Wymark's* caſe. 2 Lutw. 1641. *Simpſon* v. *Garſide.* 2 Lev. 142. *Mayor of London* v. *Gorrey.* S. C. Freem. 400. 1 Term Rep. 149. *Rex* v. *Amery,* per *Euller J.* Or to plead to the juriſdiction of the court, Gilb. C. B. 184. Or to claim conuſance, 10 Mod. 125. 130. *Caſe of Univerſity of Cambridge.* 2 Wilſ. 411. *Leaſingby* v. *Smith.* Or to plead a plea of aid-prayer. 2 Boſ. & Pull. 284. it being a clear principle of law, that no dilatory plea can be pleaded in another term after a general imparlance. It was formerly holden, that a tender with an uncore priſt could not be pleaded after a general imparlance, being conſidered as a dilatory plea, like a plea in abatement, but it ſeems the law is now taken to be otherwiſe, agreeably to what had been determined before. Dy. 300. a. pl. 37. See 1 *Saund.* 33. *note* (2). If the defendant, being intitled to an imparlance, be deſirous of pleading in abatement of the writ, bill, or declaration, he muſt apply for an imparlance *with a ſaving of all exceptions to the writ, bill or count.* This ſort of imparlance is called a ſpecial one, and in the C. B. is granted of courſe by the prothonotary upon an application to him within the firſt four days of the term ſubſequent to that of the declaration; but in K. B. is grantable only by leave of the court, which is obtained by a ſide bar rule. If on the plea in abatement it be neceſſary to make up the iſſue, whether of law or fact, where the proceeding is by bill, the

with the appurtenances in *Derby* aforesaid, which said 40 acres of land with the appurtenances are, and at the said time when, &c. and also from the time whereof the memory of man is not to the contrary, were parcel of a certain common field called *Littlefield*, in *Derby* aforesaid. And the said *Edward* further says, that the borough of *Derby*, in the county of *Derby*, is an ancient borough, and that he the said *Edward* is and at the said time when, &c. and long before, was and yet is, one of the burgesses of the said borough; and that the burgesses of the said borough from time whereof the memory of man is not to the contrary, until the 11th day of *July*, in the 14th year of the reign of the lord *Charles* the first late king of *England*, were a body politic and corporate by the name of the bailiffs and burgesses of the borough of *Derby*, and by the same name were used to plead and be impleaded. And the said *Edward* further says, that in and upon the said 11th day of *July*, in the 14th year of the reign of the said lord *Charles* the first late king of *England*, &c. he the said lord the king *Charles* the first by his letters patent made under his great seal of *England*, bearing date at *Westminster* on the said 11th day of *July*, in the 14th year of his reign

Derby, an ancient borough, and defendant a burgess of it.

The burgesses of the said borough were immemorially a body corporate, by the name of bailiffs, &c. until 11th July, 14 Car. I.

On which day they were incorporated by the name of the mayor and burgesses of the borough of *Derby*.

the special imparlance must be entered on the plea, as well to prevent a discontinuance, as to shew the defendant's right to plead such a plea. See the form, Clift. Ent. 21. 1 Lutw. 6. *Gawen* v. *Surby*. Lill. Ent. 7. *Brown* v. *Deeble*. And in both courts the practice is to state the special imparlance on the plea, when it is delivered to the plaintiff intitled of the term subsequent to the declaration. 4 Term Rep. 520, 521. *Doughty* v. *Lascelles*. 6 Term Rep. 369. *Buddle* v. *Willson*. 7 Term Rep. 447. *Blackmore* v. *Fleming*, *note* (d). The pleading of a misnomer in abatement after an imparlance in this form, viz. "And L. L. who is "sued by the name of S. L. in his "proper person comes and says that he "was baptized, &c." has been held not to amount to a special imparlance. 4 Term Rep. 520. though the contrary was decided in 1 Black. Rep. 51. *Brewster* v. *Capper*. S. C. 1 Wilf. 261. The form of a special imparlance where the proceeding is by original, is, "And A. "B. who is sued by the name of C. B. "in his proper person comes, and saving "to himself all advantages and exceptions, as well to the writ, as to the "declaration aforesaid, prays leave to "imparl thereunto here until, &c. and "it is granted to him; the same day is "given to the said D. here, &c. At "which day comes here as well the "said D. by his attorney, as the said

"A. B.

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reign aforeſaid, did conſtitute and create the bailiffs and burgeſſes of the borough aforeſaid to be from thenceforth for ever a body politic and corporate, by the name of the mayor and burgeſſes of the borough of *Derby*, in the county of *Derby*, as by the ſaid letters patent, which he the ſaid *Edward* here into court brings, more fully and at large appears. And the ſaid *Edward* further ſays, that the bailiffs and burgeſſes of the ſaid borough from time whereof the memory of man is not to the contrary, until the ſaid 11th day of *July*, in the 14th year of the reign of the ſaid lord *Charles* the firſt; and the mayor and burgeſſes of the ſaid borough, on the ſaid 11th day of *July*, in the 14th year aforeſaid, and continually from thenceforth afterwards hitherto, have had, and for the whole time aforeſaid, have been accuſtomed to have for themſelves, and every burgeſs of the ſaid borough, common of paſture

And preſcribes in the ſaid corporation for themſelves and every burgeſs to have common in *Littlefield*, for all their commonable cattle, levant & couchant within the ſaid borough, at certain particular times.

"A. B. in his proper perſon, and ſays, "&c. Herne 1c. And where the proceeding is by bill, the form is, "And A. B. who is ſued by the name "of C. B. in his proper perſon comes, "and ſaving to himſelf all advantages "and exceptions to the ſaid bill, prays "leave to imparl thereto, and it is "granted to him, &c. And thereupon "a day is thereof given to the parties "aforeſaid, before our lord the king at "*Weſtminſter*, until, &c. to wit, to the "ſaid A. to imparl to the bill aforeſaid, "and then to anſwer, &c. At which "day, before our lord the king at *Weſtminſter* comes as well the ſaid D. by "his attorney aforeſaid, as the ſaid A. "B. in his proper perſon, and the ſaid "A. B. ſays, &c." Lib. Plac. 2 pl. 15. But the defendant cannot after a a ſpecial imparlance plead to the juriſdiction of the court; therefore if he be intitled to an imparlance to the next term, and would plead to the juriſdiction, he muſt have a ſtill more ſpecial imparlance *with a ſaving of all advantages and exceptions whatſoever*. This is uſually denominated *a general ſpecial imparlance*, and can only be obtained by an application to the court on motion within the firſt four days of the next term, and it is in the diſcretion of the court, governed by the particular circumſtances of the caſe, to grant it or not. They will not grant it for inſtance, if the defendant has appeared to the proceſs *by attorney*, becauſe a plea to the juriſdiction muſt be pleaded in perſon. 2 Black. Rep. 1094 — 1097. *Grant* v. *Lord Sondes*. The prothonotary has no power to grant this kind of ſpecial imparlance; a plea under a grant of ſuch an imparlance from him, would be a nullity, and the plaintiff might ſign judgment, or at leaſt, a reſpondeas ouſter would be awarded. 12 Mod. 529. *Anon.* 1 Lutw. 46. *Wentworth* v. *Squib*. 2 Black. Rep. 1094. After ſuch an imparlance as this, the defendant is at liberty to plead

paſture in the ſaid field called *Littlefield*, whereof, &c. for all their commonable cattle (1) *levant and couchant within the ſaid borough of Derby*, that is to ſay, in every two years together ſucceſſively, when the ſaid field called *Littlefield*, whereof, &c. or any part thereof ſhall be ſown with any kind of corn, after the ſaid corn, in the ſaid field called *Littlefield*, whereof, &c. is reaped, gathered and carried away, until the ſaid field, or ſome part thereof ſhall be ſown again with ſome kind of corn, and in every third year when the ſaid field called *Littlefield*, whereof, &c. lies freſh and fallow then for the whole year; wherefore he the ſaid *Edward*, *on the 1ſt day of Auguſt, in the 20th year of the reign of our ſaid lord the now king*, which was a third year, when the ſaid field called *Littlefield*, did lie freſh and fallow, put the ſaid gelding and mare which were his the ſaid *Edward*'s own proper cattle, and levant and couchant within the ſaid borough of *Derby*, into the ſaid field called *Littlefield*, whereof, &c. to depaſture the graſs there growing to uſe his ſaid common, and on that occaſion with his feet in walking, and with his ſaid gelding and mare eat up, trod down and conſumed the ſaid graſs then growing in the ſaid place, in which, &c. as he lawfully might; *which is the ſame* reſidue of the ſaid treſpaſs, whereof the ſaid *Henry* above thereof now complains againſt him. *Without this, that* the ſaid *Edward* is guilty of any treſpaſs in the ſaid place in which, &c. with the ſaid gelding and mare at any time after the ſaid field, or any part thereof, was ſown with

(1) The words in italicks were omitted in the plea in *Mellor* v. *Spateman*. 1 Saund. 340.

[3]

And put his cattle into the common,

Which is the ſame treſpaſs.

And traverſes that he is guilty after the field was ſown, and before the corn was reaped and taken away.

his privilege. Hard. 365. *Clapham* v. *Lenthall*. 1 Lutw 46. 12 Mod. 529. Gilb. C. B. 210, 211. If the defendant plead in abatement after a general imparlance, or to the juriſdiction after a ſpecial imparlance, the plaintiff may either ſign judgment. 4 Term Rep. 520. *Doughty* v. *Laſcelles*. 7 Term Rep. 447. *Blackmore* v. *Fleming*, *note* (d). or apply to the court to ſet aſide the plea; or he may demur to it. 6 Term Rep. 369. *Buddle* v. *Willſon*. 1 Wilſ. 261. *Brewſter* v. *Copper*. 3 Inſtruct. Cler. 40. Or the defendant may allege the general imparlance in his replication by way of eſtoppel. Clift. 18. pl. 46. 19. pl. 50. 20. pl. 53, 54. 1 Lutw. 23. *Bartelot* v. *Burton*. 3 Inſtruct. Cler. 39. But if the plaintiff reply to the plea, inſtead of demurring, or alleging the eſtoppel, the fault is cured. 1 Vent. 236. *Dacres* v. *Duncomb*, per Hale, C J.

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with corn in any year, and before the corn in the ſame year, in the ſaid field called *Littlefield*, was reaped, gathered and carried away from thence. And this he the ſaid *Edward Walker* is ready to verify; wherefore he prays judgment if the ſaid *Henry* ought to have or maintain his aforeſaid action thereof againſt him, &c.

To this there is a general demurrer, and a joinder in demurrer, and then the entry proceeds;

But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes whereof the parties aforeſaid have put themſelves upon the judgment of the court, a day therefore is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until day next after to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king now here is not yet thereof, &c. And as to try the ſaid iſſue above joined, between the ſaid parties to be tried by the country, let a jury thereof come before our lord the king at *Weſtminſter*, on the day aforeſaid, and who neither, &c. to recogniſe, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid there, &c.

[4] Curia adviſare vult.

And a venire to try the iſſue.

Caſe 1.

Mellor *verſus* Walker.

S. C. 2 Keb. 678. 676. 1 Sid. 462. 1 Vent. 92. Where the defendant in treſpaſs juſtifies at another time, and not at the time in the declaration, yet if it be averred to be the *ſame treſpaſs* whereof the plaintiff complains, the plea is good in ſubſtance. A traverſe that ſufficiently anſwers the material point of the declaration is good.

TRESPASS by *Mellor* againſt *Walker*, the plaintiff declares, that the defendant on the 1ſt of *April*, in the 21ſt year of the reign of the now king, with force and arms broke the cloſe of the plaintiff called *Littlefield*, at *Derby*, in the county of *Derby*, and with his feet in walking, and with certain cattle, to wit, horſes, bulls, &c. depaſtured, trod down and conſumed his graſs to the value, &c. there growing, and other wrongs, &c.

The defendant as to all the treſpaſs, except with his feet in walking, and a treſpaſs with one gelding and one mare, pleads not guilty; and as to that, he pleads that the borough of *Derby* is an ancient borough, and that the defendant at the time when, &c. was and is one of the burgeſſes of the ſaid borough; and that the burgeſſes of the ſaid borough from time whereof, &c. until the 11th day of *July*, in the 14th

year

year of the reign of king *Charles* the firſt, were a body politic and corporate by the name of the bailiffs and burgeſſes of the borough of *Derby*, and by the ſame name uſed to plead and be impleaded; and the defendant further ſays, that on the ſaid 11th day of *July*, in the 14th year aforeſaid, the ſaid late king *Charles* the firſt, by his letters patent under his great ſeal, changed the name of the corporation to the name of mayor and burgeſſes of the ſame borough; and then the defendant preſcribes, that the ſaid bailiffs and burgeſſes from time whereof, &c. until the ſaid 11th day of *July*, in the 14th year aforeſaid; and the mayor and burgeſſes of the ſaid borough, on the ſaid 11th day of *July*, and always afterwards had, and for the whole time aforeſaid had been accuſtomed to have, for themſelves, and every burgeſs of the ſaid borough, common in the ſaid field called *Littlefield* whereof &c. for all their commonable cattle, levant and couchant, within the ſaid borough of *Derby*, that is to ſay, in every two years together ſucceſſively, when the ſaid field called *Littlefield*, or any part thereof, ſhould be ſown with any kind of corn, after the ſaid corn was reaped, gathered and carried away, until the ſaid field, or ſome part thereof, ſhould be ſown again with corn; and in every third year when the ſaid field, called *Littlefield*, lay freſh and fallow, then for the whole year, &c. wherefore the defendant, *on the 1ſt of Auguſt, in the 20th year of the reign of the now king*, which was a third year, when the ſaid field, called *Littlefield*, lay freſh and fallow, put in the gelding and mare aforeſaid, which were the defendant's own proper cattle, and levant and couchant within the borough of *Derby*, aforeſaid, to depaſture the graſs there growing, uſing his common aforeſaid there, &c. and ſo juſtifies the treſpaſs; and avers, that it is *the ſame treſpaſs* whereof the plaintiff complains againſt him; and traverſes, *without this* that the defendant is guilty of any treſpaſs with the ſaid gelding and mare at any time after the ſaid field was ſown with grain; and avers, that the corn there growing was taken and carried away. And this, &c. wherefore, &c. upon which the plaintiff demurs in law.

Da Coſta v. *Clarke*. 2 Boſ. & Pull. 257.

[5]

And the exception to the plea was, that the plaintiff has laid the treſpaſs in his declaration to be on the *1ſt day of April, in the 21ſt year of the king*, and the defendant has juſtified the

treſpaſs

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treſpaſs on the 1ſt day of *Auguſt*, in the 20*th* year of the ſame king, ſo that he neither agrees with the time in the declaration, nor ſhews any reaſon why he does not agree with it; for the defendant does not ſay that on the 1ſt day of *April*, in the 21ſt year, the field was ſown with corn, for which reaſon he could not juſtify the treſpaſs at that time; and therefore the defendant ought to have juſtified the treſpaſs at the preciſe time laid in the declaration. And the traverſe does not help the plea, becauſe he has only traverſed the time when the field was ſown; but throughout the whole plea, it is not ſaid, whether the field was ſown at the time of the treſpaſs laid in the declaration, or not: neither has the defendant traverſed the walking with feet at all, and therefore it was ſaid that the plea was bad. It was moved in *Trinity* 22d of the preſent king, and the court took time to conſider.

And it being now moved again in this term, *Hale*, *C. J.* *Rainsford* and *Morton* concurring, held the plea good enough in ſubſtance; for the defendant having averred in his plea, that it is the ſame treſpaſs of which the plaintiff complains, and the plaintiff having demurred generally, it is only form and not ſubſtance, of which no advantage can be taken on a general demurrer. And the traverſe has ſufficiently anſwered the material part of the declaration; for if, at the time of the treſpaſs laid in the declaration, the field was ſown, then he has traverſed it; but if it was not ſown, it appears by the plea that the defendant had a good right to put in his cattle, and therefore taking it either way, the defendant has juſtified, or traverſed, the treſpaſs in the declaration: therefore they gave judgment for the defendant (3).

(3.) This ſeems to be an informal plea, as well on account of the addition of a traverſe, as of it's varying from the time in the declaration. The traverſe is added after a ſufficient confeſſion and avoidance, and therefore bad on a ſpecial demurrer; it being averred by the defendant, that the time when he put in the cattle was in a third year, when the field was fallow, and ſo within the preſcription. The true way of pleading ſuch an averment, is agreeable to the plea in *Mellor* v. *Spateman*. 1 Saund. 340. and ſee alſo Lib. Plac. 338. The plea admits the treſpaſs, and ſtates a juſtification which is a legal bar to the action

action, if the fact be true; and concludes with an averment of it's being *the ſame treſpaſs* with that which is alleged in the declaration; for which reaſon it is held to be improper and ſuperfluous to add a traverſe. As where in treſpaſs *clauſum fregit* laid on the 10th day of *November*, the juſtification was on the 11th, with an averment of it's being the *ſame* treſpaſs, it was adjudged that the plea was good without a rraverſe, and the addition of it, being ſpecially ſhewn for cauſe of demurrer, made the plea bad. 2 Lutw. 1457. *Hargrave* v. *Ward*. So where in treſpaſs *clauſum fregit* on the 7th day of *May*, the defendant juſtified the treſpaſs on the 10th of *May*, and averred it to be the *ſame* treſpaſs, the court on demurrer determined that the plea was good without a traverſe of the treſpaſs on the 7th of *May*. 1 Bulſ. 138. *Vaſſenope* v. *Tayler*. And alſo where in an action of treſpaſs and falſe impriſonment on the laſt day of *October*, the defendant juſtified on the 13th of *Auguſt*, under a warrant from the ſheriff, and averred it to be the *ſame* treſpaſs, the court was of opinion that the plea was good without a traverſe, the day not being material. Cro. Car. 228. *Tyler* v. *Wall*. So where in treſpaſs for taking goods, the defendant juſtified at another time under a writ of *fieri facias*, and concluded with an averment of it's being the *ſame* treſpaſs, and on demurrer the objection was, that the defendant, varying in the time of taking from that alleged in the declaration, ought to traverſe any other taking, for the ſame goods might be taken at ſeveral times, and the averment of it's being the ſame treſpaſs was not ſufficient; but it was decided that the plea was ſufficient without a traverſe. *Sir T. Jones*. 146. *Allen* v. *Chamming*. And in 1 Str. 694. *Courtney* v. *Satchwell*, which was treſpaſs and falſe impriſonment, the defendant juſtified under a proceſs out of the ſheriffs court in *London*, *quæ eſt eadem*, &c. and traverſed being guilty *aliter vel alio modo*, the traverſe was held ill on a ſpecial demurrer, the *quæ eſt eadem*, &c. being itſelf a ſufficient traverſe See alſo Yelv. 122, 123. *Lane* v. *Alexander*. 1 Saund. 13, 14. *Hawe* v. *Planner*. Ibid. 22. *Bennet* v. *Filkins*. Ibid. 209. *Salmon* v. *Smith*. Ibid. 312. *Rex* v. *Kilderby*. 2 Salk. 641, 642. *Green* v. *Goddard*. In like manner, the reaſon of adding the traverſe here appears to be, becauſe the defendant juſtified the treſpaſs at another time than that in the declaration, the treſpaſs complained of being laid on the 1ſt day of *April*, and the treſpaſs juſtified on the 1ſt day of *Auguſt*. See *White* v. *Stubbs*. Poſt. 294. It ſeems, however, to have been long ſince eſtabliſhed, that the plaintiff is not tied to the time laid in the declaration, nor the defendant to that mentioned in the plea; but the former is allowed to give evidence of a treſpaſs committed at any time before the commencement of the action, Co Lit. 283. a. and the latter is at liberty to prove his juſtification on any other day. As the time is not material in evidence, neither is it in pleading, and therefore the general rule ſeems to be, that the plea ought to follow the day laid in the declaration. 1 Saund. 14. *Hawe* v. *Planner*. But the juſtification may be ſuch as to make the time material, and then the plaintiff may vary in his replication from the day in the declaration without a departure. Thus where in an action of aſſault, battery, and falſe impriſonment on ſuch a day, the defendant pleads a ſpecial matter of juſtification at another day, ſo that the

day

day becomes material; as where he juſtifies as mayor or conſtable at ſuch a time, but in truth, the treſpaſs complained of was done by him when he was not mayor or conſtable, the plaintiff may reply an impriſonment, or, in other words, may new-aſſign the treſpaſs at another day, and it is no departure, for the day in the declaration is not material. And in the preſent caſe, if the defendant had juſtified on the ſame day in the declaration, but in truth had put in his cattle at the time the field, or any part of it, was ſown, and *that* was the treſpaſs the plaintiff intended by his declaration, he might ſhew that fact by way of new aſſignment. So in other actions, where the day in the declaration is not material, the plaintiff may, when it is rendered neceſſary by the defendant's plea, vary in his replication from the day, and it is no departure; but if the day in the declaration be material, as in an action upon a bond, bill of exchange, promiſſory note, and the like, the plaintiff in his replication cannot vary from the day without a departure. Cro. Eliz. 168. *Smith* v. *Hillier*. 1 Lev. 110, 111. *Lee* v. *Rogers*. 1 Salk. 222. *Webley* v. *Palmer*. Ibid. 223. *Howard* v. *Jenniſon*. 1 Ld. Raym. 121. *Serle* v. *Darford*. 2 Ld. Raym. 1015. 1 Str. 21. *Cole* v. *Hawkins*. 2 Str. 806. *Matthews* v. *Spicer*.

With reſpect to the averment in the plea of it's being the *ſame* treſpaſs, a diſtinction is taken between a juſtification on the ſame, and on another day; in the former it is held to be unneceſſary in ſome actions of treſpaſs to conclude with ſuch an averment, but in the latter it is thought to be a right thing ſo to conclude. As where in treſpaſs *clauſum fregit* on the 1ſt day of *May*, the defendant pleaded *a licence* on the ſame day, it was adjudged that there is no need of averring it to be the ſame treſpaſs. So it is where in treſpaſs for taking goods the defendant juſtify on the ſame day; or plead *ſon aſſault* on the ſame day to an action of aſſault and battery. But if he juſtify on another day, or at another place, he ought to conclude his plea with an averment of it's being the *ſame* treſpaſs. 21 H. 7. 32. pl. 52. S. C. Fitz. *Treſpaſs* 248. Bro. *Treſpaſs* 219. and the ſame diverſity is recogniſed in 1 Bulſt. 138. *Vaſtenope* v. *Tayler*. Skin. 387. *King* v. *Tebbart*. But this diſtinction ſeems now to be of little uſe; as indeed it neceſſarily would be, as ſoon as it was fully eſtabliſhed that the day and place in the declaration in ſuch actions is not material, for the plea when properly drawn will follow the day in the declaration; but if it ſhould vary from it, ſo that there is an apparent difference on the record between the treſpaſs in the declaration, and that which is juſtified, the diſtinction will take place, and the plea muſt conclude with ſuch an averment. 2 Lutw. 945. 946. *Rowel* v. *Dyon*. And at this day in a plea of *ſon aſſault*, or *of a licence*, it is neither neceſſary, nor very uſual, to add an averment of it's being the ſame treſpaſs; but in treſpaſs for taking goods, an inſtance can hardly be put of a juſtification in which it is not neceſſary to conclude with that averment, although the plea follows the day in the declaration.

So the *place* alleged in the declaration in aſſault and battery, or treſpaſs for taking goods is immaterial, being only laid for a venue; and unleſs the juſtification be local, the defendant is bound to follow it; for if he juſtify at another place, either with or without a traverſe of the place in the declaration, the plea

is bad on a ſpecial demurrer. Co. Litt. 282 b. 1 Saund. 85. *Wright* & *Ramſcot*; and the rule is the ſame in actions upon the caſe, aſſumpſits on parol promiſes, and in many other tranſitory actions. Thus, where in trover and converſion of his oxen in *London*, the defendant pleaded that he ſeized them as waifs in the manor of D. in *Eſſex*, and traverſed that he was guilty in *London*; it was adjudged that the plea was bad, becauſe it did not contain any local matter to make the place material. Cro. Eliz. 174. *Bullock* v. *Smith*. And where in falſe impriſonment at *Briſtol*, the defendant juſtified arreſting the plaintiff at *Glouceſter* under a commiſſion of rebellion, and traverſed the impriſonment at *Briſtol*, the plea was held bad, becauſe the matter of the juſtification was tranſitory, and not local, and therefore the defendant ought to have juſtified in the place where the action was brought. Ibid 184. *Cowleigh* v. *Edwards*. So where in aſſault and battery in *London*, the defendant pleaded ſon aſſault at D. in the county of S. and traverſed that he was guilty in *London*, on demurrer it was adjudged that the plea was bad, becauſe the defence being tranſitory, the defendant could not plead it in another place, and traverſe the place where it was alleged. Ibid 842 *Purſet* v. *Hutchings*. See further, 1 Lutw. 345. *Pyke* v. *Pulleyn*, Ibid 618. *Treene* v. *Hiccox*, 6th exception. 2 Lutw. 1437, 1438. *Searle* v. *Darford*, S. C. 1 Ld. Raym. 120. 3 Lev. 113. *Bridgewater* v. *Bethoway*. 1 Leon. 39 *Queen* v. *Ld. Vaux*. 2 Mod. 271. *Barker* v. *Warren*, Carth. 326 *Martin* v. *Wilcord*. But where the cauſe of the juſtification is local, as if in an action of falſe impriſonment in *Middleſex*, the defendant juſtify as conſtable of the vill of B. in another county, or in another place in the ſame county, arreſting the plaintiff for a breach of the peace; or as a juſtice of the peace in another county; or juſtify damage feaſant, or becauſe the defendant offered to enter into his houſe, in another county, or in another place in the ſame county; the defendant muſt traverſe the county of *Middleſex*, and not reſt there, but alſo traverſe every other county or place except that which his juſtification is confined to. As where in treſpaſs for taking goods in *London* the defendant pleaded that he let a dwelling houſe in *St. Paul, Covent Garden*, to the plaintiff, and diſtrained the goods for rent, and traverſed that he was guilty in *London*, or elſewhere *out of St. Paul, Covent Garden*; and upon demurrer the traverſe was held ill, becauſe the defendant might be guilty in another houſe within *Covent Garden*. 1 Sid. 293. It ſeems the form of the traverſe out to have been, "Without this, that he the ſaid "A. (the defendant) is guilty of the "ſaid treſpaſs in *London* aforeſaid, "or elſewhere, *except in the ſaid dwelling "houſe in St. Paul, Covent Garden aforeſaid.*" See alſo Co. Litt. 282. b. Cro. Eliz. 167. *Smith* v. *Hillier*. Ibid. 504. *Thomſon* v. *Clerk*. Ibid. 705. *Peacock* v. *Peacock*. Ibid. 842 *Purſet* v *Hutchings*. 3 Lev. 227. *Bodle* v. *Wilkins*. Cro. Jac. 45. *Wadhuſt* v. *Damme*. 2 Lutw 1437. *Searle* v *Darford*. There ſeem to be two grounds for this ſtrictneſs in the plea; one is, that it may appear to the court that the defendant acted under the authority of law; and the other is to aſcertain with correctneſs the place of the juſtification, that it may be known where the *venire facias* is to be awarded; and

yet the traverſe added to the plea ſeems to be an immaterial one, for the plaintiff cannot take iſſue on the traverſe, but muſt either anſwer the cauſe of juſtification, or traverſe it, according to circumſtances; which proves that it is an immaterial traverſe. 1 Ld. Raym. 121. *Searle* v. *Darford*. S. C. 2 Lutw. 1438. In the ſame manner it is neceſſary in the preſent practice of changing the venue on motion, that the affidavit in ſupport of the application ſhould be poſitive that the plaintiff's cauſe of action aroſe in the county of A. (to which the venue is ſought to be changed) and not in the county of B. (where the venue is laid), or elſewhere out of the county of A.; for if material evidence ariſes in two counties, the venue may be laid in either, or in a third county, and the court will not change it, becauſe the uſual and neceſſary affidavit cannot be made; and this is the ground of the rule, that if the plaintiff will undertake to give ſome evidence of the matter in iſſue in the county where the action is laid, the court will not change the venue. 2 Salk. 669. Anon. 1 Wilſ. 178. *Herring* v. *Durant*. 2 Term Rep. 238. *Scott* v. *Breſt*. Ibid. 275. *Watkins* v. *Towers*. 7 Term Rep. 583. *Mayor of London* v. *Cole*. 7 Rep. 1. *Bulwer's* caſe. The reaſon why the defendant, when his juſtification conſiſts of tranſitory matter, is bound to follow the place in the declaration and cannot traverſe it, ſeems to be, becauſe he would otherwiſe be able to change the venue in a tranſitory action to any county he likes, in ſubverſion of an ancient principle of law, which allows the plaintiff to lay the venue in ſuch an action in any place he pleaſes. Co. Litt. 282. b. 1 Lutw. 14. And on the other hand, the reaſon of traverſing the place in the declaration when the juſtification is local, we have ſeen, is, becauſe the defendant by this means may change the venue to the place alleged in the plea; for if iſſue be joined on the cauſe of the juſtification, and the locality of it be admitted thereby, then, according to another ancient principle of law, the venue muſt come from that place, whether it be in the ſame county, or in another; and if the cauſe be not tried there, the judgment at the common law was erroneous. Thus in Cro. Eliz. 261. *Ford* v. *Brooke*, cited in 1 Saund. 247. *Craft* v. *Boite*, where in an action of ſlander for perjury at *Dale* in *Eſſex*, the defendant juſtified that the plaintiff was perjured at *Weſtminſter*, and the venue was awarded to be from *Weſtminſter* in *Middleſex*. So where in an action for calling the plaintiff a thief at *Dale* in *Eſſex*, the defendant juſtified becauſe the plaintiff had committed a robbery at *Sale* in the ſame county, the plaintiff replied, &c. *de injuriâ ſuâ propriâ abſque*, &c. the venue was awarded to be from *Sale*. Ibid. 870. *Clerk* v. *James*. Alſo, where in error on a judgment in caſe for words laid to be ſpoken at B. in the county of *Salop*, the defendant pleaded he ſpoke them as a witneſs upon his oath on an iſſue tried at C. in the county of *Somerſet*; the plaintiff replied, *de injuriâ ſuâ propriâ*, &c. and the cauſe being tried by a venire at B. the error was that it ought to have been by a viſne of C. where the juſtification aroſe: and it was held clearly to be a miſ-trial, and not aided by the ſtatute of jeofails, wherefore the judgment was reverſed. Ibid. 468. *Bowyer's* caſe S C. Moor, 410 But where the matter of the local juſtification is falſe, being pleaded merely for the purpoſe of drawing the trial

trial to that place, the plaintiff may traverſe it, and the iſſue is to be tried in the county where the action is laid. As where in falſe impriſonment in the ward of F. in *London*, the defendant juſtified under a judgment and writ of execution in *Sandwich* in *Kent*, and the taking and impriſoning there, and traverſed his being guilty in *London*; the plaintiff replied that the defendant was guilty in *London*, and traverſed that there is any ſuch record in *Sandwich*. Moor, 350. *Paramour* v. *Verwold*. S. C. Pop. 101. Cro. Eliz. 418. 6. P. 2 Lutw. 1438. But the law has been altered in theſe reſpects by the ſtatutes 16 & 17 Car. 2. c. 8. and 4 Ann. c. 16. ſ. 6.; by the former of which it is enacted, that after verdict no judgment ſhall be arreſted or reverſed, for that there is no right venue, ſo as the cauſe of action were tried by a jury of the proper county or place where the action was laid; and the latter ſtatute directs that that the *venire facias* ſhall be awarded out of the body of the county where ſuch iſſue is triable. It was adjudged in the above-mentioned caſe of *Craft* v. *Boite*, and which has been adhered to ever ſince, that where an iſſue, joined on a local juſtification in the county of *Oxford*, was tried by a jury of *London* where the action was laid, this miſ-trial was aided by the ſaid ſtatute of *Charles* the 2d. The ſtatute of *Ann* having thus aboliſhed all diſtinction of venues, and extinguiſhed the doctrine of miſ-trials in the *ſame county*, and the ſtatute of *Charles* the 2d. having alſo remedied after verdict an erroneous award of the *venire facias into another county*, it follows, that the defendant cannot compel the plaintiff to try the cauſe in the county where the matter of the juſtification aroſe. Hence it hath been the conſtant practice for a great length of time paſt to try the cauſe in the county where the venue is laid in the declaration. The grounds and reaſons of the different manner of pleading, when the juſtification is tranſitory and when local, which were founded upon a ſolid and ſubſtantial point of law, being put an end to by theſe ſtatutes, it is now reduced to mere form; and the court, as in other caſes of form, will not lend a willing ear to captious objections to the plea, but will perhaps think that the averment of its *being the ſame treſpaſs*, which includes in itſelf a traverſe of the place in the declaration, is ſufficient at this day without the addition of a formal traverſe of it. However it is proper and ſafe to adhere to the uſual form, for probably the court will feel themſelves bound by the courſe of precedents, as their predeceſſors did in a former caſe; where, in treſpaſs, which was laid at *Hereford*, in the county of *Hereford*, for taking the plaintiff's cattle and driving them away, and converting them to his uſe, the defendant pleaded not guilty as to the converſion, and as to the taking and driving them away juſtified as bailiff of the manor of A. and that ſuch proceedings were had in the court of the manor, that a diſtringas iſſued directed to the defendant, who by virtue thereof diſtrained the plaintiff's cattle to enforce his appearance at the manor court, and concluded *quæ eſt eadem tranſgreſſio*, without traverſing the place laid in the declaration. The court, after two arguments upon a ſpecial demurrer for want of a traverſe, gave judgment that the plea without a traverſe was not an anſwer to the treſpaſs at *Hereford*, and *Lee* C. J. cited Cro. Eliz. 705. which ſays that a traverſe is neceſſary, and thought the plea bad in

ſubſtance. *Wright* J. was of the ſame opinion; but *Deniſon* J. doubted whether it was bad in ſubſtance, though he was clear it was ſo in form, and *that* being ſhewn for cauſe of demurrer, judgment was given the plaintiff.

When the treſpaſs in the plea appears on the record to be the ſame treſpaſs with that in the declaration, or is alleged to be ſo by an averment of its being the ſame treſpaſs, and the plaintiff traverſes the cauſe of juſtification, he thereby admits it to be the ſame treſpaſs, although in fact it be a different one; and the plaintiff cannot afterwards give evidence at the trial that the treſpaſs in the plea is a different one from that which he intended in his declaration; he is eſtopped by his admiſſion; for inſtead of traverſing the matter of the plea, he ought to have denied the averment of its being the ſame treſpaſs. This ſeems to be the foundation of a new aſſignment; as where a licence, or ſon aſſault is pleaded, and the defendant has in the former caſe exceeded the licence, and in the other, had once beat the plaintiff in his own defence, but afterwards beat him without any reaſon, and there is only one count in the declaration; the plea in plain language is, "you gave me a licence to "cut down trees," or, "you aſſaulted "me, and I beat you in my own de- "fence, which I had a right to do," *and that is the treſpaſs you complain of in the declaration*: if the plaintiff deny the licence, or that he aſſaulted the defendant, he admits that the treſpaſs in the plea is the ſame with that in the declaration; therefore if the defendant prove a licence from the plaintiff to cut down trees, or an aſſault by him on the defendant, at any time; (the day being immaterial, as we have already ſeen, in the plea as well as in the declaration) the plaintiff will not be allowed to ſhew in evidence, that the treſpaſs he intended in the declaration was for cutting down trees *at another time* without his licence, or a battery *at another time* when he did not aſſault the defendant. The ſame obſervation will be found to apply to moſt caſes where a new aſſignment is held to be neceſſary; though in many of them, conſiſting of intricate and perplexed facts, the reaſon does not appear ſo obvious.

Jeffreſon

Jeffreſon, executor of Jeffreſon *againſt* Morton, and Dawſon, and others, Tertenants of *Yarway*.

Caſe 2.

Eaſter. 21 of King Car. II. Roll. 291. or 201.

JEFFRESON v. MORTON and others.

Scire facias by an executor upon a recognizance in chancery againſt the tertenants, vendees of the conuſor.

England, { BE it remembered, that Sir *Orlando Bridgman*, to wit. { bart. keeper of the great ſeal of our ſaid lord the new king of *England*, &c. on *Monday* in three weeks of *Eaſter*, in the ſame term, before our ſaid lord the king at *Weſtminſter*, with his own hand delivered here into the court of our ſaid lord the king, a certain record (1) had before our ſaid lord the king in his chancery at *Weſtminſter*, in the county of *Middleſex*, in theſe words: Pleas before our lord the

(1) Though the plaintiff ſhould die *within* a year after he has obtained judgment, his perſonal repreſentative cannot have execution againſt the defendant without a *ſcire facias*. Fitz. Execution. 243. where *ſcire facias* ſeems to be inſerted by miſtake inſtead of *fieri facias*. 15 H. 7. 16. b. 1 Roll. Abr. 900 (P.) pl. 1, 2.; nor, in caſe of the death of the defendant within that period, can the plaintiff have an elegit under the ſtatute of *Weſtminſter* 2d. c. 18. againſt his lands in the hands of his heir, or terre-tenants, or generally any other execution, without a *ſcire facias* againſt his heir and terre-tenants, or perſonal repreſentative; although he may in ſome caſes have a *fieri facias* againſt his goods in the hands of his executor, as we have already ſeen. See 1 Saund. 219. e. f. *Wheatly* v. *Lane*. So where the conuſee dies within a year, his executor cannot have an elegit upon a recognizance at common law without a *ſcire facias*; nor, if the conuſor dies within that time, can the conuſee have an elegit againſt his heir, or terre-tenants, without ſuch writ. F. N. B. 597. D; the rule being, that where a new perſon, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to, the execution, there muſt be a *ſcire facias* to make him a party to the judgment, or recognizance. 1 Ld. Raym. 245. *Penoyer* v. *Brace*. S. C. 1 Salk. 319, 320. 2 Ld. Raym. 768. *Queen* v. *Ford*. 2 Inſt 471. At the common law, if the plaintiff did not ſue out execution *within* a year and a day after judgment in perſonal actions, or recognizance acknowleged, he could not have a *ſcire facias*, but the plaintiff or conuſee was obliged to bring an action of debt on the judgment or recognizance. This being a tedious proceſs, the ſtatute *Weſtminſter* 2d. (13 Ed. 1.) c. 45. gives a *ſcire facias* upon a judgment in *perſonal actions*, and upon a recognizance, *after* a year and a day; but a *ſcire facias* lay at the common law after that time on a judgment

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the now king in his chancery at *Weſtminſter*, in the county of *Middleſex*, of the term of the *Holy Trinity*, in the 20th year of the reign of our lord *Charles* the 2d, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. *Middleſex*, to wit. Our lord the king has ſent to the ſheriff of the county of *Middleſex* his writ cloſe in theſe words, to wit: *Charles* the 2d, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Middleſex* greeting, whereas on the 16th day of *Auguſt*, in the 12th year of our reign, *Robert Yarway*, citizen and merchant-taylor of *London*, appearing perſonally before us in our chancery, acknowledged himſelf

Scire facias.

R. Y. entered into recognizance to T. F.

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ment in a *real* action. 2 Inſt. 469 Co. Litt. 290. b. 291. and Lord *Holt* ſeems to have been of opinion, that a *ſcire facias* might always have been ſued out upon a judgment in perſonal actions after a year and a day. 1 Salk. 258. *Withers* v. *Harris*. It is called a *ſcire facias* from theſe eſſential words in the writ, "*quod* ſcire facias *prefat*. T. (the defen-" ant) *quod ſit coram* &c. *oſtenſurus ſi* " *quid pro ſe habeat aut dicere ſciat quare* " &c." whence it appears that the defendant or conuſor is to be warned *to plead in bar of the execution*; and therefore a releaſe of all executions is held to be a good plea; it is alſo conſidered in the nature of an action, and therefore a releaſe of *all actions* is a bar to it; for whenever the defendant may *plead* to any writ, whether original, or judicial as this writ is, it is in law an action. Co. Lit. 290. b. 291. 3 Mod. 289. *Obrian* v. *Ram*; and the plea may pray judgment *if the plaintiff ought to have or maintain his action*. 2 Wilſ. 251. *Grey* v. *Jones*. 2 Black. 1227. *Pulteney* v. *Townſon*. 1 Term Rep. 268. *Fenner* v. *Evans*. 2 Term Rep. 46. *Winter* v. *Kretchman*, ſee alſo Skin. 682. *Woodyeer* v. *Greſham*. If execution be ſued out after the year and day without a *ſcire facias*, it is not void, but voidable only by writ of error. 3 Lev. 404. *Patrick* v. *Johnſon*. 1 Salk. 261. *Howard* v. *Pitt*, in which *Ruſſel's* caſe, 4 Leon. 177. to the contrary is denied. If a recognizance be acknowledged in chancery, that is, in the ordinary legal court there, it may hold plea of a *ſcire facias* to have execution; but if iſſue be joined, or there be a demurrer to part, and iſſue on the reſidue, the chancellor delivers the whole record to the court of K. B. but not to any other, and judgment is given there upon the demurrer as well as upon the iſſue. Latch. 3, *Blaxton's* caſe. 1 Eq. Caſ. Abr. 128. And it is not neceſſary the iſſue ſhould be tried at bar, it may be tried at Niſi Prius. Cro. Car. 313. *Eyres* v. *Taunton*. From the words "with his own hand," it ſeems, the chancellor formerly uſed to deliver the record to the court of K. B. himſelf; but the preſent courſe is to deliver it by the clerk of the petty bag, for what is done by his officer may be ſaid to be with the proper hand of the chancellor, 1 Eq. Caſ. Abr. 129.

(a) The

himſelf to owe to *John Jeffreſon*, of *High Holborn*, in your county, eſq. 4000l. of lawful money of *England*, which he ought to have paid him on the feaſt of *St. Bartholomew* the apoſtle then next following, as appears to us by an inſpection of the rolls of our ſaid chancery, and did not pay the ſame to the ſaid *John* in his life-time, or, after the death of him the ſaid *John*, to *John Jeffreſon*, gent. executor of the laſt will and teſtament of the ſaid *John Jeffreſon* deceaſed, as it is ſaid, we command you that, by good and lawful men of your bailiwick, you make known to the ſaid *Robert*, that he be before us in our ſaid chancery in three weeks from the day of the *Holy Trinity* next coming wheresoever it ſhall then be, to ſhew if he have, or can ſay any thing for himſelf why the ſaid money (2) ought not to be levied of his lands and chattels, and delivered to the ſaid executor according to the force, form, and effect of the ſaid recognizance, and that you have there the names of thoſe by whom you ſhall ſo cauſe it to be made known to him, and this writ. Witneſs ourſelf at *Weſtminſter*, the 26th day of *May*, in the 20th year of our reign.

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Sheriff commanded to warn R.

At which ſaid three weeks of the *Holy Trinity*, before our ſaid lord the now king in his ſaid chancery here, to wit, at *Weſtminſter* aforeſaid, comes the ſaid *John Jeffreſon*, the now plaintiff, by *John Wilkinſon* his attorney, and the ſheriff of the county of *Middleſex* aforeſaid, to wit, *Sir Dennis Gauden*, knt. and *Sir Thomas*

Sheriff returns that R. is dead.

(2) The *ſcire facias* ought to conclude *quare executio fieri non debet*, and if the words "*non debet*" are omitted, it is ſaid, the writ is bad and not amendable. 2 Lutw. 1281, 1282. *Baxter* v. *Peach*. 3 Keb. 190. *Manel* and *Colthoe's* caſe. If the defendant dies after judgment, the concluſion of the *ſcire facias* againſt his perſonal repreſentative muſt be according to the ſituation of the cauſe at the time of his death; as where the defendant died after interlocutory judgment and damages aſſeſſed on a writ of inquiry, but before final judgment, the concluſion of the *ſcire facias* againſt his executor muſt not be to ſhew cauſe *wherefore a new writ of inquiry ſhould not be awarded*; for the damages were aſſeſſed before the defendant's death, and the writ would therefore be quaſhed; but it ought to be *why the damages aſſeſſed ſhould not be adjudged to the plaintiff*. 1 Will. 243. *Goldſworthy* v. *Southcott*. If the defendant had died after the award of the writ of inquiry, and before the execution of it, the concluſion muſt be why the damages ought not to be aſſeſſed and recovered by the executor. Lill. Ent. 647.

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Another ſcire facias.

[7]

Thomas Davies, knt. now here returns that the ſaid *Robert* is dead; whereupon our lord the now king ſent his other writ cloſe directed to the ſheriff of *Middleſex* aforeſaid, in theſe words; *Charles* the 2d, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Middleſex* greeting, whereas on the 16th day of *Auguſt*, in the 12th year of our reign, *Robert Yarway*, citizen and merchant-taylor of *London*, perſonally appearing before us in our chancery, acknowledged himſelf to owe to *John Jeffreſon*, of *High Holborn*, in your county, eſq. 4000*l*. of lawful money of *England*, which he ought to have paid to him on the feaſt of *St. Bartholomew* the apoſtle then next following, as appeared to us by inſpection of the rolls of our ſaid chancery, and had not paid the ſame to the ſaid *John* in his life-time, or, after the death of him the ſaid *John*, to *John Jeffreſon*, gent. executor of the laſt will and teſtament of the ſaid *John Jeffreſon* deceaſed, as it was ſaid, we lately commanded you by our writ that, by good and lawful men of your bailiwick, you ſhould make known to the ſaid *Robert Yarway*, that he ſhould be before us in our ſaid chancery, at a certain day now paſt, wherеſoever it ſhould then be, to ſhew if he had or could ſay any thing for himſelf why the ſaid money ought not to be levied of his lands and chattels, and delivered to the ſaid executor according to the force, form, and effect of the ſaid recognizance; and that you ſhould have there the names of thoſe by whom you ſhould ſo cauſe it to be made known to him, together with our ſaid writ: at which day, in our ſaid writ contained, you returned to us in our ſaid chancery that the ſaid *Robert* is dead, as by the return thereof remaining of record on the (3) files of our ſaid chancery more fully appears, therefore we command you that, by good and lawful men of your bailiwick, you make known to the heir (4) of the ſaid *Robert*, and

(3) The reaſon of uſing this word is, becauſe the legal proceedings of the court are not enrolled as in the courts of common law *in rolls*, but remain *on files* in the office of the petty-bag. 4 Inſt. 80.

(4) It is the uſual way to join the heir and tenants of the lands, or, as they are generally called, terre-tenants in the writ of *ſcire facias*. F. N. B. 597, note (a) Cro. Eliz. 8. 6. *Heydon's* caſe. Cro. Car. 295. *Eyres* v. *Taunton*. 2 Salk. 598. *Panton* v. *Hall*. Lill. Ent. 384, 385; but it is ſaid, that if it be returned that the heir has no lands, the writ

and alſo to the tenants of the lands and tenements which were of the ſaid *Robert* at the time of the recognizance aforeſaid, or at any (5) time after, that they be before us in our chancery in three weeks from the day of *St. Michael* next coming, whereſoever we ſhall then be, to ſhew if they have or can ſay any thing why the ſaid 4000l. ought not to be levied of the lands and tenements which were of the ſaid *Robert* at

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Sheriff commanded to warn the heir and tertenants of R. Y.

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writ may proceed againſt the tenants of the lands without him, F. N. B *ubi ſupra:* and it may be either againſt the tenants of the lands generally without naming them, or againſt them by name. F. N. B. *ubi ſupra.* 2 Salk. 600. *Proctor* v. *Johnſon*; but the former is the beſt form, and is now conſtantly uſed, for if the plaintiff undertake to name them, he muſt name them all, and if he do not, thoſe who are named may plead in abatement. Comb. 282. *Berisford* v. *Cole.* The writ, whether on a judgment recovered againſt the anceſtor, or a recognizance acknowledged by him, which is in the nature of a judgment, may alſo be brought againſt the heir without the tenants of the lands; the plaintiff however cannot have execution againſt the heir of any more than a moiety of the lands which were his anceſtor's at the time of the judgment or recognizance, or after. For it is held, that the heir is chargeable *as tenant of the lands*, and not as heir, and that an action of debt does not lie againſt him on the judgment or recognizance, as it does on the bond, of his anceſtor, but a *ſcire facias* only to have execution of the anceſtor's lands in his hands. 3 Rep. 12. *Sir W. Harbert's* caſe. Dy. 271 a. pl. 25. *Sir W. Jones*, 87, 88. *Bowyer* v. *Rivitt.* S. C. 3 Bulſt. 317. Palm. 419. Poph. 153. And as the execution which the plaintiff, or conuſee, is intitled to ſue out againſt the tenant of the lands, is a writ of elegit by virtue of the ſtatute of *Weſtminſter* 2d. (13 Edw. 1.) c. 18. by which no more than a moiety of the lands is delivered by the ſheriff, therefore the execution againſt the heir, who is liable only as tenant of the lands, muſt neceſſarily be the ſame. And as when execution is taken out againſt the anceſtor in his life time, the plaintiff or conuſee can extend only a moiety of his lands by the writ of elegit, ſo the execution is the ſame after his death; for the *ſcire facias* is merely for the purpoſe of enabling the plaintiff or conuſee to ſue out execution againſt the lands of the anceſtor in the hands of the heir, which he is prevented from doing by the death of the anceſtor. See Skin. 682. *Woodyeer* v. *Greſham*; but it does not alter the nature of the execution any more than it does the nature of the debt. 2 Atk. 608. *Stileman* v. *Aſhdown.* S. C. Amb. 13—17. Another reaſon aſſigned is, that the heir is not named either in the judgment or recognizance; the form of the judgment being, that the plaintiff do recover his debt, or his damages aſſeſſed, and of the recognizance, that he is content, and grants that execution ſhall be made of his lands and tenements. 3 Rep. 12. b. *Sir W. Harbert's* caſe, 3 Bulſt. 321. *Boyer* v. *Revett* per *Doddridge*

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at the time of the ſaid recognizance, or at any time after, and delivered to the ſaid executor according to the force, form, and effect of the ſaid recognizance, (6) and have there the names of thoſe by whom you ſhall ſo cauſe it to be made known

ridge J. And though the heir plead a falſe plea to the *ſcire facias*, it does not vary the execution, for the remedy given by the ſtatute of *Weſtminſter* 2d cannot be enlarged or altered by the plea of the heir, or tenant of the lands. *Sir W Jones*, 87, 88. Carth. 93. *Brandlin* v. *Millbank*. S. C. Comber. 162. However in ſome reſpects the heir is conſidered as ſuch, for if he be an infant, he may to the writ of *ſcire facias* pray his age, and the parol will demur. 3 Rep. 13. b. *Sir W. Harbert's* caſe.

But if an action be brought againſt the heir *on an obligation* made by his anceſtor in which he has bound his heirs, the heir is not charged as tenant of the lands, but as a debtor in the *debet and detinet*; for if he be charged in the *detinet* only, it was error at the common law, but is now aided after verdict by ſtatute 16 and 17. Car. 2. c. 8. § and in caſe judgment is given againſt him, *the whole* of the land deſcended which he was ſeiſed of at the time of ſuing the original writ, or filing the bill, may be delivered to the plaintiff in execution, though the plaintiff was not intitled to have any part of the land in execution againſt the anceſtor himſelf. Dy. 373. b Plow. 441. *Davy* v. *Pepys*. 3 Rep. 12. a. *Sir W. Harbert's* caſe. *Sir W. Jones*, 87. *Bowyer* v. *Rivitt*. S. C. Pop. 151. 2 Atk. 603. *Stileman* v. *Aſhdown*. See the form of the extent againſt an heir. Tidd. Prac. Forms, 356 And the reaſon ſeems to be becauſe, the common law allowing an action of debt againſt the heir on the bond of his anceſtor, and the executor being intitled to the whole of the perſonal eſtate, the plaintiff would derive no fruit from his action, unleſs he could take the real eſtate in execution. 3 Rep. 12. a. And as the obligee may ſue either the heir or executor, the heir cannot plead that there is an executor, and that he has aſſets. Bro. *Aſſets per Deſcent* 33. Plow. 439. b. *Davy* v. *Pepys*. Dy. 204. b. 3 Lev. 189. *Davies* v. *Churchman*. 2 Atk. 426. 1 P. Will. 203. The heir, however, is not liable any further than to the value of the land: and therefore to an action againſt him on the bond of his anceſtor, the heir may plead payment by him to other bond creditors, before the commencement of the action, to the full value of the lands. 1 Str. 665. *Buckley* v. *Nightingale*. But in order that the heir ſhould be no further liable, it is neceſſary for him to confeſs the action, and ſhew the certainty of the aſſets. Plow. 440. *Davy* v. *Pepys*. 2 Roll. Abr. 71. 1 Str. 665: (the form of the plea, and of a prayer of judgment for the aſſets confeſſed, together with an award of an inquiry of the annual value of them, and of the writ of inquiry, may be ſeen in Raſt. Ent. 172. b. 173. a. Lib. Plac. 173, 174). For if iſſue be taken on the quantity of aſſets, and it be found that the heir has other lands by deſcent, 7 Mod. 44. *Smith* v. *Angel*; or if he plead a fact which he knows to be falſe, and it be found againſt him; as where he ſays that he has *nothing* by deſcent, and the jury find that he has *ſomething*, however ſmall

known to them, and this writ; witneſs ourſelf at *Weſtminſter*, the 10th day of *June*, in the 20th year of our reign.

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At which ſaid three weeks of *St. Michael* before our ſaid lord the now king, in his ſaid chancery here, to wit, at *Weſtminſter*

ſmall it may be, and inſufficient to diſcharge the debt, the plaintiff is intitled to a general judgment for the debt, damages, and coſts, and to ſue out the like execution againſt him as on a judgment for his own debt; and therefore the plaintiff may have a *capias ad ſatisfaciendem*, *fieri facias*, or an *elegit* for a moiety of all the lands which the heir is ſeiſed of whether by deſcent or otherwiſe. Plow. 440. *Davy* v. *Pepys*. 2 Leon. 11. *Hinde* and *Lyon's* caſe, 2 Roll. Abr. 70. (C.) pl. 2. Dy. 149. a. *Sir W. Jones*, 87. *Bowyer* v. *Rivitt*. So it is where the heir pleads payment by a co-obligor. Carth. 93. *Brandlin* v. *Millbank*. S. C. Comb. 162. or pleads a bad plea, 2 Ld. Raym. 783. *Smith* v. *Angell*. S. C. 1 Salk. 354. 7 Mod. 40. 3 Bac. Abr. 30. but it ſeems certain from the preſent liberality of the courts, that the defendant would be permitted to amend his plea, if the defect aroſe from miſpleading, and the plea be an honeſt and fair one. And a ſpecial judgment, that the plaintiff ſhall recover the debt, damages and coſts, *to be levied out of the lands deſcended*, given without the plaintiff's conſent, is erroneous. 2 Roll. Abr. 71. pl. 8, 9. 2 Ld. Raym. 786. *Smith* v. *Angell*. There is ſome difference of opinion with reſpect to the nature of the judgment when obtained againſt the heir on demurrer, or by default. In *Bowyer* v. *Rivitt*, *Sir W. Jones*, 88. S. C. Poph. 153. it is laid down, "that though the "judgment againſt the heir be a general one when he pleads a falſe plea, "yet if the judgment be *by confeſſion*, "*nil dicit*, or *non eſt informatus*, it muſt "be only of the aſſets deſcended," and the ſame is held in Dy. 81. a. *Finch's* law. 384, But in *Davy* v. *Pepys*, Plow. 440. it is ſaid, "that if the heir do not con-"feſs the action, and ſhew the certainty "of the aſſets, but pleads that he has "nothing by deſcent, or if judgment be "given *by default*, or *nil dicit*, or *confeſ-"ſion, or on any other matter or ground "whatſoever*, without confeſſing and "ſhewing the certainty of the aſſets, the "plaintiff ſhall have execution of his "other land, or of his goods, or of his "body, as he ſhould have for the debt "of the heir himſelf on his own bond." And the ſame law is holden in the following authorities. 2 Roll. Abr. 70. (C.) pl. 2, 3, 4, 5. 2 Roll. Abr. 71. (D.) pl. 1. Moor 522. *Barker* v. *Borne* S. C. Cro. Eliz. 92. Dy. 81. a. in margin. 2 Atk. 205. *Kinaſton* v. *Clark*. 2 Ld. Raym. 786. *Smith* v. *Angell*. S. C. 1 Salk 354. 7 Mod. 44. in which laſt caſe *Lord Holt* ſays, "that the au-"thority of *Davy* v. *Pepys* has been "murmured at, but there is not a word "of it which is not good law." And the better opinion ſeems to be agreeable hereto, and indeed it appears to be confirmed by the legiſlature itſelf; for by the ſtatute of frauds, 29 Car. 2. c. 3. ſ. 11. it is provided, "that no heir who is "chargeable by reaſon of any eſtate or "truſt made aſſets in his hands by that "act,

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minſter aforeſaid, comes the ſaid *Joſeph Jeffreſon* now plaintiff, by his ſaid attorney, and the ſheriff of the county of *Middleſex* aforeſaid now here returns, that by virtue of the writ to him directed, by J. B. and J. M. good and lawful men of his bailiwick,

" act; ſhall by reaſon of any kind of plea, " *or confeſſion of the action*, or ſuffering " judgment *by nient dedire, or any other* " *matter*, be chargeable to pay the con- " demnation out of his own eſtate; but " execution ſhall be ſued of the whole " eſtate ſo made aſſets in his hands by " deſcent, in whoſe hands ſoever it ſhall " come after the writ purchaſed, in the " ſame manner as it is to be at and by " the common law where the heir at law, " pleading a true plea, judgment is " prayed againſt him thereupon:" So by ſtatute 3 Will. and Mar. c. 5. ſ. 6. it is enacted, " that if judgment be " given againſt the heir by confeſſion of " the action, without confeſſion that aſſets " deſcended, or upon demurrer, or *nihil* " *dicit*, *it ſhall be for the debt and damages* " without any writ to inquire of the " lands, tenements, or hereditaments ſo " deſcended." But a ſpecial judgment may ſometimes be more beneficial to the plaintiff than a general one; for if the heir ſhould not have any lands beſides thoſe which he has by deſcent, the plaintiff can have only *a moiety* delivered to him by an *elegit* on a general judgment, whereas he is intitled to the *whole* on a ſpecial judgment; and therefore it is holden that the plaintiff may ſuggeſt that the heir has particular lands by deſcent, and pray execution of the whole of them. *Sir W. Jones* 87. *Bowyer* v. *Rivitt*. 2 Roll. Abr. 71, 72. (D). pl. 3. 1 Bro. Cha. Caſ. 430. Arg. The plea of *non eſt factum* of the anceſtor is an exception to the rule, for if it be found falſe, it does not alter the judgment, but the lands deſcended only are liable to execution. Cro. Car. 437. *Clothworthy* v. *Clothworthy*.

If the heir has a reverſion expectant on the term or leaſe *for years*, it is the opinion of *Lord Holt*, which ſeems to be well founded, that he cannot plead the term in delay of execution, though there are ſome precedents to that purpoſe, as Herne 307. 1 Lutw. 442, 443. *Smith* v. *Boughton*. Lib. Plac. 150. pl. 106. 1 Str. 665. *Buckley* v. *Nightingale*, but he ought to confeſs aſſets in poſſeſſion without taking notice of the term, the freehold and inheritance amounting to ſuch aſſets; for the common law before the ſtatute of *Gloceſter*. 6 Edw. 1. c. 11. looked upon a term as of no value, and therefore did not protect the intereſt of the termor, but permitted the tenant of the freehold to deſtroy it by ſuffering a recovery in a real action, though by collusion, 2 Inſt. 321. And the confeſſion of aſſets in poſſeſſion cannot affect the intereſt of the termor or leſſee for years in the land; for if the plaintiff ſue out a *levari facias*, the term or leaſe will be a complete defence to an ejectment brought on the return of the extent. 2 Ld. Raym. 784, 785. *Smith* v. *Angell*. S. C. 1 Salk. 354, 355. S. P. 2 Wilſ. 49. *Villers* v. *Handley*. So in a late caſe, where an ejectment was brought on the return of an eligit againſt the defendant who was in poſſeſſion of the premiſes under a leaſe for years prior to the date of the plaintiff's judgment, the learned judge

wick, he had cauſed to be made known to *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, tenants of two dwelling houſes with the appurtenances in *Gray's Inn Lane*, in the pariſh of *St. Andrew, Holborn*, in his bailiwick, now or late

judge who tried the cauſe, being of opinion that the defendant, having a legal title antecedent to the plaintiff's, ought to prevail, though the defendant had received a notice from the plaintiff that he did not intend to diſturb his poſſeſſion, nonſuited the plaintiff, which was afterwards confirmed by the court. 8 Term Rep 2. *Doe* v. *Wharton*. But where the heir has only a reverſion expectant on *the life* of another, he may plead it, and the plaintiff may take judgment of aſſets *quando acciderint*. Dy. 373. b. Carth. 129. *Kellow* v. *Rowden*. 2 Ld. Raym. 784. *Smith* v. *Angell*. Lib. Plac. 208. pl. 218.

With reſpect to the declaration againſt the heir, it is neceſſary to obſerve, that where the lands whave deſcended from the obligor to another *who has died ſeiſed*, and from him to the defendant, the deſcent muſt be ſtated ſpecially, as that the defendant is the heir of A, (who died laſt ſeiſed), who was the heir of the obligor; and ſo it muſt be, where there have been ſeveral intermediate deſcents; for if the declaration be againſt the defendant as *heir of the obligor*, and it appear in evidence on the plea of *riens per diſcent from the obligor*, that the defendant is heir *of the heir* of the obligor, it is a fatal variance. Thus where the declaration was againſt the defendant as brother and heir of the obligor, and it being found, on the iſſue of *riens per diſcent from him*, that he died ſeiſed in fee leaving a ſon, who entred and *died ſeiſed* without iſſue, leaving the defendant his uncle, the obligor's brother, his heir at law; the court gave judgment for the defendant, for he had nothing as *immediate* heir to his brother, but to his nephew. Cro. Car. 151. *Jenk's* caſe. ſee Lill. Ent. 147. So where in debt againſt the defendant as heir of B. it appeared in evidence on the iſſue of *riens per diſcent* from B. that he died ſeiſed in fee leaving the defendant his daughter, and his wife with child of a ſon, who was afterwards born and lived an hour after his birth, it was held that this evidence did not ſupport the iſſue, for the defendant had nothing from the father the obligor, but the lands came to her by deſcent as heir of her brother *who was laſt ſeiſed*. 2 Roll. Abr. 709. pl. 62. S. C. cited in 3 Mod. 256. *Kellow* v. *Rowden*. And ſo is Dy. 68. a. But if the intermediate heirs have not *had actual ſeiſin* of the fee which deſcended from the obligor, it ſeems unneceſſary to notice them in the declaration; as where A. being ſeiſed in fee bound himſelf and his heirs in a bond, and having two ſons B. and C. limited the eſtate to himſelf for life, remainder to B. his eldeſt ſon in tail, reverſion to his own right heirs, and died; B. entered and died, leaving a ſon D. who died without iſſue, upon whoſe death, the eſtate tail being extinct, the reverſion came into poſſeſſion, and deſcended in fee on C. the youngeſt ſon of A. who was the heir as well of D. as of A.; in

debt

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late in the tenure or occupation of H. F. and E. D. or their aſſigns, and alſo to *Richard Dawſon*, and *Alexander Orpwood*, tenants of twelve dwelling-houſes with the appurtenances in *Shire-lane*, in the pariſh of *St. Clement Danes*, in his ſaid bailiwick,

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debt againſt C. on this bond, the plaintiff declared againſt him as heir of A. and on *riens per deſcent* from A. it was objected that the intermediate deſcents ought to have been ſpecially ſtated, but it was adjudged that the declaration was proper; for although B. and D. had each of them ſuch an intereſt in the reverſion in fee, as that they might have ſold, charged, or forfeited it, yet they had not *actual ſeiſin* thereof in poſſeſſion ſo as to be either aſſets in their hands, or to make a *poſſeſſio fratris* to prevent the brother of the half blood from inheriting, but they were *ſeiſed* only of the eſtate tail, and the father being the perſon who was laſt ſeiſed of the fee, it was ſufficient to charge the defendant as heir to him according to the well known rule of law upon the ſubject in Co. Litt. 11. b. 15. a: Carth. 126. *Kellow* v. *Rowden*. S. C. 3 Mod. 253. 1 Show. 244. 3 Lev. 286. and ſee Bro. Diſcent. 14. 30. 8 Term Rep. 213. It is held to be unneceſſary to ſtate how the defendant is heir, for it may not be in the plaintiff's knowledge; as where the defendant is the nephew or couſin of the perſon who died laſt ſeiſed, it is enough to charge him generally as his heir. Thus where in debt upon bond againſt the defendant as heir of his anceſtor, it was objected on demurrer, that it was not ſtated in the declaration *how* the defendant was heir; but the court over-ruled the objection, and took a difference between an action *by* and *againſt* an heir; in the former caſe he muſt ſhew his pedigree, and how heir, for it lies within his knowledge; but in the latter it is not neceſſary, for he is a ſtranger, and it would be hard to compel him to ſet forth another's pedigree. 1 Salk. 355. *Denham* v. *Stephenſon*. S. C. 6 Mod. 241.

At the common law if the heir had *bonâ fide* aliened the lands which he had by deſcent, before an action was commenced againſt him, he might diſcharge himſelf by pleading that he had nothing by deſcent *at the time of ſuing out the writ, or filing the bill*, and the obligee had no remedy at law, though in equity the heir was reſponſible for the land. 1 P. Will. 777. *Coleman* v. *Winch*. S. C. Prec. in Chan. 512. 1 Roll. Abr. 269. (C) pl. 2. 5 Mod. 123. *Redſhaw* v. *Heſter*. Carth. 245. *Gree* v. *Oliver*. 2 Atk. 204. *Kinaſton* v. *Clark*. But if he had made a fraudulent alienation before the action, it was void at the common law, and is ſo now by the ſtatute 13 Eliz. c. 5. which is in this reſpect declaratory of the common law, and the obligee may either have a general judgment againſt the heir, or a ſpecial one, and take out execution of the land in the hands of the alienee. As where an action was brought againſt the defendant as heir, who pleaded *riens per deſcent* on the day of ſuing out the writ, and it was found that before the commencement of the action the defendant had aliened the aſſets of covin to defraud the plaintiff of his debt; the court was of opinion that it was well found for the plaintiff on the iſſue of *riens per deſcent*, and

gave

wick, now or late in the ſeveral tenures or occupations of S. P. widow, J. C. M. R., D. J., E. B., H. T., W. J., W. C., J. P., T. S., R. P., B. B. and their aſſigns, which ſaid ſeveral dwelling-houſes were the (7) dwelling-houſes of the ſaid *Robert*

gave judgment for him. Dy. 149 a. in the margin. 1 Roll. Abr. 269. (C.) pl. 3. But now by ſtatute 3 and 4 W. and M. c. 5. ſ. 5. reciting, "that ſeveral perſons being heirs at law to avoid "the payment of ſuch juſt debts as, in "regard of the lands, tenements and "hereditaments deſcribing to them, "they have by law been liable to pay, "have ſold, aliened or made over ſuch "lands, &c. before any proceſs was or "could be iſſued againſt them, it is "enacted, that in all caſes where any "heir at law ſhall be liable to pay the "debts of his anceſtor in regard of any "lands, &c. deſcending to him, and ſhall "ſell, aliene, or make over the ſame "before any action brought, or proceſs "ſued out againſt him, that ſuch heir "at law ſhall be anſwerable for ſuch "debt, or debts, in an action, or actions "of debt, *to the value of the ſaid land "ſo by him ſold, aliened, or made over;* "in which caſe all creditors ſhall be "preferred as in actions againſt execu-"tors and adminiſtrators; and ſuch "execution ſhall be taken out upon any "judgment or judgments ſo obtained "againſt ſuch heir, *to the value of the "ſaid lands*, as if the ſame were his own "proper debt or debts; ſaving that the "lands, *bonâ fide* aliened before the "action brought, ſhall not be liable to "ſuch execution." And by ſection 6th it is enacted, "that where any action "of debt upon any ſpecialty is brought "againſt any heir, he may plead *riens "per diſcent* at the time of the original "writ brought, or the bill filed againſt "him, and the plaintiff may reply that "he had lands, &c. from his anceſtor *be-"fore the original writ brought, or bill filed;* "and if upon iſſue joined thereupon it "be found for the plaintiff, *the jury ſhall "enquire of the value* of the lands, &c. "ſo deſcended; and thereupon judg-"ment ſhall be given, and execution "ſhall be awarded as aforeſaid; but if "judgment be given againſt ſuch heir "by confeſſion of the action, without "confeſſing the aſſets deſcended, or upon "demurrer, or *nil dicit*, it ſhall be for the "debt and damages, without any writ to "enquire of the value of the lands, &c. "ſo deſcended." Whenever the plaintiff replies according to this ſtatute, he is not intitled to a general judgment as he was at common law, but can recover only the value of the land ſold as found by the jury, be it what it may. Carth. 354. *Redſhaw* v. *Heſther*, S. C. Comb. 344. 5 Mod. 119, 122, 123. And the jury muſt find the value, for if they neglect to do ſo, the court will award a *venire de novo*. 10 Mod. 18, 19. *Jeffry* v. *Barrow*. That which the jury are directed to find is the *groſs* value, in which reſpect it differs from the writ of inquiry at common law, for that was to inquire the *annual* value. If the heir has *not* ſold the land, it ſeems the plaintiff may nevertheleſs reply according to the ſtatute; and, if the defendant be poſſeſſed of perſonal property equivalent to the lands, it will in general be a prudent thing in the plaintiff, and the moſt equitable

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Robert Yarway, deceaſed, at the time of the recognizance aforeſaid, that they ſhould be before our ſaid lord the now king, in the ſaid chancery here at this day, to ſhew and propoſe, as by the ſaid writ he was commanded; and further that there was no heir, (8) nor were there any other tenant

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equitable proceeding towards the defendant, to do ſo; for as the ſtatute obliges the jury to find the value, and directs a general judgment and execution for ſo much money proportionable to the value, the plaintiff may levy the debt out of the defendant's perſonal eſtate, and he will be protected from paying any more than the amount of the property which he has from his anceſtor. Carth. 354. *Redſhaw* v. *Hefher*. For if another bond creditor ſhould afterwards bring an action againſt him, he may plead the judgment and execution, or payment without an execution, in bar of the action, in which plea he muſt aver that the ſum levied or paid is to the value of the land which he has by deſcent, 1 Str. 665. *Buckley* v. *Nightingale*. However the plaintiff, inſtead of replying according to the ſtatute, may take iſſue on the plea of *riens per diſcent*, and in that caſe the jury muſt not inquire of the value of the lands, but the ſame proceeding is to be purſued as at common law. Barnes 444. *Mathews* v. *Lee*. The replication given by the ſtatute, does in ſome meaſure vary from that at the common law; the form of the latter is to take iſſue on the plea, and *conclude to the country*, thus, "And the "ſaid A. ſays, that he by reaſon, &c. "ought not to be barred, &c. becauſe "he ſays, that on the day of ſuing out "his original writ, (or exhibiting his "ſaid bill,) to wit, on, &c. the ſaid B. "had ſufficient lands and tenements by "hereditary deſcent as heir to the ſaid C. "in fee ſimple, wherewith he might have "ſatisfied the ſaid A. the debt and damages aforeſaid, to wit, at, &c. and "this *he prays may be inquired of by the* "*country*, &c." Raſt. ent. 172. Lib. Plac. 180, 181. 428. Lill. ent. 147. but the replication given by the ſtatute, after ſtating that the heir had lands by deſcent *before* the commencement of the action, *concludes with an averment*, and is in this form, &c. becauſe he ſays, "that before the day of ſuing out the "original writ, (or exhibiting his ſaid "bill) to wit, on, &c. the ſaid B. had "ſufficient lands and tenements by he"reditary deſcent as heir to the ſaid C. "in fee ſimple, wherewith he might "have ſatisfied the ſaid A. the debt and "damages aforeſaid, to wit, at, &c. "*and this he is ready to verify*; where"fore he prays judgment, and the debt "aforeſaid, together with his damages "on occaſion of the detention of that "debt, to be adjudged to him, &c." and the defendant in his rejoinder takes iſſue on this allegation. See the form 1 Richardſon, C. P. 522. 5 edit. 2 Richardſon, 295, 296, 297. Soon after the act, an objection was taken to a replication drawn in the laſt mentioned form, becauſe the plaintiff, it was ſaid, had put the value of the lands in iſſue by the words, "wherewith he might "have ſatisfied the ſaid A. the debt "aforeſaid," which ought to have been omitted, for the ſtatute is expreſs that after the iſſue tried, the jury ſhall inquire

of

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tenant (9) or tenants of any other lands or tenements which were of the ſaid *Robert Yarway* at the time of the ſaid recognizance in his bailiwick to whom he could ſo cauſe it to be made known.

Sheriff returns that there is no heir.

And the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, by *John Wilkinſon* their attorney, and the ſaid *Richard Dawſon* and *Alexander Orpwood* by *Sir Cyrill Wich* knt.

Plea.

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of the value, ſo that it is matter of inqueſt only *ex officio*, and not to the point of the iſſue: but the court upon debate held the replication proper, *and that if thoſe words had been omitted*, it might have been a good cauſe of objection; for the ſtatute does not give occaſion to alter any more of the uſual replication in this caſe, than the time concerning the aſſets by deſcent; and the concluſion, which before the ſtatute was to the country, muſt now be with an averment, that the defendant may have an opportunity of anſwering the new matter alleged in the replication. Carth. 353, 354, *Redſhaw* v. *Heſther*. Hence it appears how neceſſary it is to know with certainty what judgment may be had againſt the heir at the common law; for the ſtatute has not altered it in any other reſpect than when a verdict is found for the plaintiff on the replication given by the ſtatute; in which caſe the plaintiff is, as we have ſeen, now intitled to recover at law the groſs value of the land deſcended, which he could not obtain before, without the aſſiſtance of a court of equity.

So if the *anceſtor* had *deviſed* the lands, a creditor by ſpecialty had not any remedy at common law againſt the deviſee. 2 Atk. 292. *Plunket* v. *Penſon*. But by the ſtatute 3 W. and M. c. 14. ſ. 2. "reciting, that it is not reaſonable or juſt that, by the practice or contrivance of any debtors, their creditors ſhould be defrauded of their juſt debts, and nevertheleſs it hath often ſo happened, that where ſeveral perſons, having by bonds, or other ſpecialties, bound themſelves and their heirs, have afterwards died ſeiſed in fee-ſimple of and in manors, meſſuages, lands, tenements and hereditaments, or had power or authority to diſpoſe of, or charge the ſame, by their wills or teſtaments, have, to the defrauding of ſuch their creditors, by their laſt wills and teſtaments deviſed the ſame, or diſpoſed thereof, in ſuch manner as ſuch creditors have loſt their ſaid debts, it is enacted, that all wills and teſtaments, limitations, diſpoſitions or appointments, of or concerning any manors, &c. or of any rent, profit, term or charge out of the ſame, whereof any perſon at the time of his or her deceaſe ſhall be ſeiſed in fee ſimple in poſſeſſion, reverſion or remainder, or have power to diſpoſe of the ſame by his or her laſt will and teſtament thereafter to be made, ſhall be deemed and taken only as againſt ſuch creditor or creditors as aforeſaid, his, her, or their heirs, ſucceſſors, executors, adminiſtrators and aſſigns, and every of them, to be fraudulent, and clearly, abſolutely, and utterly void, fruſtrate, and of none effect, any pretence, color, feigned or preſumed conſideration, of any other matter or thing to the contrary notwithſtanding." And by ſection 3. "for the means that ſuch creditors may be enabled to recover their ſaid debts, it

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knt. their attorney on the ſame day here likewiſe come: and thereupon the ſaid *John Jeffreſon*, the now plaintiff, prays that the ſaid *John*, *Humphry*, *Thomas*, *Richard*, and *Alexander* may anſwer to the writ aforeſaid, &c. And the ſaid *John*, *Humphry*, *Thomas*, *Richard*, and *Alexander* ſay, that the ſaid *John Jeffreſon*,

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" it is enacted, that in the caſes before " mentioned, every ſuch creditor or cre- " ditors ſhall and may have and main- " tain his, her, or their action of debt " upon his, her, or their ſaid bonds and " ſpecialties, againſt the heir and heirs " at law of ſuch obligor or obligors " and ſuch deviſee or deviſees jointly, by " virtue of this act; and ſuch deviſee or " deviſees ſhall be liable and chargeable " for a falſe plea by him or them plead- " ed, in the ſame manner as any heir " ſhould have been for any falſe plea by " him pleaded, or for not confeſſing the " lands or tenements to him deſcended." And by ſection 4, it is enacted, " that " where there ſhall be any limitation or " appointment, deviſe or diſpoſition, of " or concerning any manors, &c. for " the raiſing or payment of any real " and juſt debt or debts, or any por- " tion or portions, ſum or ſums of " money, for any child or children of " any perſon other than the heir at law, " according to, or in purſuance of any " marriage contract, or agreement in " writing, *bonâ fide* made before ſuch " marriage, the ſame, and every of them, " ſhall be in full force; and the ſame " manors, &c. ſhall and may be holden " and enjoyed by every ſuch perſon or " perſons, his, her, and their heirs, exe- " cutors, adminiſtrators, and aſſigns, for " whom the ſaid limitation, appoint- " ment, deviſe or diſpoſition was made, " and by his, her, and their truſtee or " truſtees, his, her, and their heirs, exe- " cutors, adminiſtrators and aſſigns, for " ſuch eſtate or intereſt as ſhall be ſo " limited or appointed, deviſed or diſ- " poſed, until ſuch debt or debts, por- " tion or portions ſhall be raiſed, paid " and ſatisfied." And by ſection 7. it is alſo enacted, " that all and every de- " viſee and deviſees, made liable by this " act, ſhall be liable and chargeable in " the ſame manner as the heir at law " by force of this act, notwithſtanding " the lands, tenements, and hereditа- " ments to him or them deviſed ſhall be " aliened before the action brought;" that is, the plaintiff ſhall recover from the deviſee the value of the lands ſo aliened. This ſtatute was made to remedy the defect in the ſtatute 13 Eliz. c. 5. of fraudulent *conveyances*, and to extend it to fraudulent *deviſes*. 2 Atk. 205. *Kinaſton* v. *Clark*. Com. Rep. 256. *Amand* v. *Jerſey*. But it is held that this act does not extend to any *ſettlement*, or *diſpoſition*, made by the obligor by *deed* in his life time, whether voluntary or otherwiſe; for it prevents the deſcent to the heir, in which reſpect alone he is liable, and the creditor cannot follow the land in the hands of the grantee, inaſmuch as a bond is not any lien upon the land, as a judgment or recognizance is; and the object of the act was to guard againſt any impoſition upon the obligor in his laſt illneſs. 1 Equ. Abr. 149. pl. 7. *Parſlowe* v. *Weedon*. S. C. cited in Prec. Chan. 521. *Brunſden* v. *Stratton*, and in Caſ. Temp. Talb. 64. *Jones* v. *Marſh*; in which *Lord Talbot* ſaid that *Mr. Vernon* diſ-

approved

Jeffreſon, the now plaintiff, ought not to have execution againſt them the ſaid *John*, *Humphry*, *Thomas*, *Richard*, and *Alexander* of the debt aforeſaid by virtue of the ſaid recognizance, becauſe they ſay that one *Richard Jackſon*, long before the day of ſuing out the ſaid writ, and continually after was, and yet is tenant of a dwelling-houſe, with the appurtenances, in the pariſh of *St. Mary*, *Aldermanbury*, commonly called by the name of the *Axe*

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That R. J. is a tertenant, and no ſcire facias againſt him.

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approved of this opinion of *Lord Macclesfield*, and never forgave him for it. This ſtatute extends only to *debts*, in which the teſtator has bound himſelf by bonds or other ſpecialties, and not to *damages* for breaches of covenants or contracts under ſeal made by him. And therefore it has been held, that an action of *covenant* does not lie upon this ſtatute againſt the heir and deviſee to recover damages for a breach of covenant made by the deviſor, but the remedy thereby given is confined to caſes where *debt* lies. 7 Eaſt, 128. *Wilſon* v. *Knubley*. As to the form of the declaration againſt the heir and deviſee jointly under this ſtatute, ſee Clift. Ent. 243. pl. 19. Lill. Ent. 145. Ibid. 529, 530. 2 Richard. C. P. 241. It is held, that the proviſo operates by way of exception upon ſuch deviſes as are for payment of debts, leaving the law juſt as it ſtood before the making of the act. 2 Atk. 292. *Plunket* v. *Penſon*; and therefore a deviſe for the payment of debts is not within the ſtatute. 2 Vez. 590. *Earl of Bath* v. *Earl of Bradford*. Willes's Rep. 521. *Gott* v. *Atkinſon*; nor a deviſe for payment of debts, *out of the rents and profits only*. 2 Atk. 104. *Ridout* v. *Earl of Plymouth*. 1 Brown. Ch. Caſ 311. *Lingard* v. *Earl of Derby*, 7 Veſ. 323. *Bailey* v. *Ekins*. But if the deviſee do not provide for the payment of debts in a manner which is practicable and can be enforced, it is a fraudulent deviſe within the ſtatute. 2 Brown. Ch. Caſ. 614. *Hughes* v. *Doulben*.

With reſpect to what ſhall be aſſets by deſcent, it is laid down as a general rule, that though the anceſtor *deviſe* the eſtate to his heir, yet if he take the ſame eſtate in quantity and quality that the law would have given him, the deviſe is a nullity, and the heir is ſeiſed by deſcent, and the eſtate aſſets in his hands. As where a man, ſeiſed of land in fee on the part of his mother, deviſes it to his heir on the part of his mother in fee, the heir is in by deſcent. 1 Salk. 242. *Reading* v. *Royſton*. S. C. Prec. Chan. 222. 2 Ld. Raym. 829. Com. Rep. 123. S. P. 2 Leon. 11. *Hinde* v. *Lyon*. Dy. 124. a. Plow. 545. *Paramour* v. *Yardley*, and note *f*. in the Engliſh tranſlation. So where a man, ſeiſed in fee on the part of his mother, deviſed to his executors for ſixteen years for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by deſcent. 3 Lev. 127. *Hedger* v. *Rowe*. So where one deviſes land to his heir, charged with a rent iſſuing out of it, or with the payment of a ſum of money, ſtill the heir takes by deſcent. Com. Rep. 72. *Clarke* v. *Smith*. S. C. 1 Salk. 241. 1 Lutw. 793. 797. S. P. 1 Ld. Raym. 728. *Emerſon* v. *Inchbird*. 2 Atk. 293. *Plunket* v. *Penſon*. So where on *riens per deſcent* pleaded, it appeared that the anceſtor deviſed the lands to the heir for payment of debts, it was

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Axe Inn, of which ſaid dwelling-houſe the ſaid *Robert Yarway* deceaſed, in the ſaid writ named, was ſeiſed in his demeſne as of fee, on the ſaid 16th day of *Auguſt*, in the 12th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. and

adjudged that the heir was in by deſcent, for the tenure is not altered. 2 Str. 1270. *Allan* v. *Heber*. S C. 1 Black. Rep. 22. But where a different eſtate is deviſed than would deſcend to the heir, the diſpoſition by the will ſhall prevail; as where the eſtate is deviſed to the heir in tail. Plows 545. So where a man, having iſſue two daughters who are his heirs, deviſes lands to them and their heirs, they take under the will, for by law they would take as coparceners, but by the will they have it as joint-tenants. Cro. Eliz. 431. Anon. *Bacon's Maxims*, Reg. n. 21. See *Reading* v. *Royſton*. 1 Salk. 242. Comyns, 123. 2 Ld. Raym. 829. But ſince the ſtatute 3 W. and M. c. 14. ſuch a deviſe is fraudulent againſt creditors by ſpecialty, and therefore an action may be brought againſt the deviſee as heir and deviſee. An advowſon in fee in groſs is aſſets for payment of debts. Co. Litt. 374. b. Bro. *aſſets per deſcent*. 421. *Sir W. Jones*. 23, 24. 2 Str. 879. *Robinſon* v. *Tonge*. S. C. 3 Bro. P. C. 556. 3 P. Will. 401. 3 Vin. Abr. 145. Mſs. caſe. 3 Atk. 464, 465. *Weſtfaling* v. *Weſtfaling*. So if a rent in fee, iſſuing out of the heir's land, deſcend to him, it is aſſets, though the rent is extinct, for it has continuance for this purpoſe. Co. Litt. 374. b. So if there be a mortgage *for years*, the reverſion in fee in the mortgagor is legal aſſets, and the bond creditor may have judgment againſt the heir, with a *ceſſet executio* until the reverſion comes into poſſeſſion; but where it is a mortgage *in fee*, the equity of redemption is not legal aſſets, and the heir may plead *riens per deſcent* to an action brought againſt him on the bond of the mortgagor. 2 Atk. 294. *Plunkett* v. *Penſon*; it is however aſſets in equity, and the creditor may have relief there. 2 Vern. 61. *Solley* v. *Gower*. But a *copyhold* which deſcends in fee is not aſſets, becauſe in notion of law it is an eſtate only at will, and though cuſtom has made it an eſtate of inheritance, yet the tenure is *ad voluntatem domini*. 4 Rep. 22. a. So at the common law an eſtate to a man and his heirs *pur autre vie* is not aſſets in the hands of the heir, for he does not properly take the eſtate by deſcent, but as ſpecial occupant. Co. Litt. 374. b. 10 Rep. 98. a. *Seymour's* caſe. However, by the ſtatute of frauds, 29 Car. 2. c. 3. ſ. 12. an eſtate *pur autre vie*, which comes to the heir as ſpecial occupant, is made aſſets by deſcent, as in caſe of lands in fee ſimple, and deviſable by a will in writing ſigned by the deviſor, and atteſted in his preſence by three or more witneſſes. A deviſe of ſuch an eſtate is held to be within the ſtatute of fraudulent deviſes, and void againſt ſpecialty creditors, and the eſtate is liable to contribute according to its groſs value. 3 Atk. 465. *Weſtfaling* v. *Weſtfaling*. So lands which deſcend in tail are not aſſets, for it muſt be a fee ſimple. 1 Roll. Abr. 269. (B.) It is laid down as a general rule, that a reverſion expectant on an eſtate tail is not aſſets, for it is in the power of the tenant in tail to bar it at his pleaſure. 1 Roll. Abr. 269. (A.) pl. 2.

6 Rep.

and that no writ of *ſcire facias* iſſued out of the court here directed to the ſheriffs of *London*, againſt the terre-tenants of him the ſaid *Robert*; and this they are ready to verify; wherefore inaſmuch as no writ of *ſcire faciae* iſſued out of the court here

6 Rep. 42. *Mildmay*'s caſe. Ibid. 58. b. *Bredimau*'s caſe. Carth. 129. *Kellow* v. *Rowden* As where A. ſeiſed in fee limits the eſtate to himſelf for life, remainder to another in tail, reverſion to himſelf in fee, and dies indebted by bond, the reverſion in fee is not aſſets, in the heir during the continuance of the eſtate tail, and he may plead *riens per deſcent*. Carth. 129. 2 Mod. 50. *Oſbaſton* v. *Stanhope*. 9 Mod. 176. arg. though in Lill. Ent. 112. there is a plea of *riens per deſcent* except a reverſion expectant on an eſtate tail; but it ſeems to be a bad plea. 2 Mod. 50. But when the reverſion veſts in poſſeſſion in the heir, it is aſſets, and he is chargeable in reſpect of it with the payment of the bond. Thus, in the caſe of *Kellow* v. *Rowden* already mentioned, the reverſion in fee in B. expectant on the eſtate tail which he was ſeiſed of was not aſſets; but when the eſtate tail was extinct, and the reverſion veſted in poſſeſſion in the heir of the obligor, it became aſſets and liable to the debt. So where T. D. being ſeiſed in fee, on his marriage, ſettled his eſtate on himſelf for life, remainder to his firſt and other ſons in tail, reverſion to himſelf in fee, and died indebted by bond, leaving a ſon who deviſed the reverſion to C. in fee, and afterwards died without iſſue; *Lord Hardwicke* held that the reverſion, having come into poſſeſſion in C. the deviſee, was aſſets to ſatisfy the bond, the deviſe being fraudulent againſt the creditor by the ſtatute 3 W. and M. c. 14. and he thought that an action of debt might be maintained againſt the heir and ſuch deviſee. If the ſon had ſuffered a recovery, the creditor was without remedy, but if he had levied a fine only, it would have barred the eſtate tail and let in the reverſion, which would be liable to the ſpecialty debts of T. D. 2 Atk. 204. *Kinaſton* v. *Clark*. In this laſt caſe, and alſo in *Kellow* v. *Rowden*, it appears that the bond was entered into by him who had been once ſeiſed in fee in poſſeſſion, and afterwards created the limitations of the eſtate, and was the perſon who died laſt ſeiſed of the fee, and therefore the heir, in claiming the reverſion on the determination of the particular limitations, was bound to derive his title to it from the obligor; but in *Smith* v. *Parker*, 2 Blac. Rep. 1230. the court of C. B. went a ſtep further, and held that where an intermediate tenant for life, remainder to his firſt and other ſons in tail, being in poſſeſſion of his eſtate for life, and having the reverſion in fee in him ſubject to intermediate eſtates for life, with contingent limitations to the firſt and other ſons of each tenant for life in tail, entered into a bond and died without iſſue, the reverſion was aſſets in the heir, when it veſted in him in poſſeſſion, to ſatisfy the bond. The caſe was, that A. ſeiſed of lands in fee deviſed them to B. for life, remainder to C. for life, remainder to his firſt and other ſons in tail, remainder to D. for life,

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here directed to the ſheriffs of *London*, they the ſaid *John*, *Humphrey*, *Thomas*, and *Alexander*, pray judgment *if they ought to be compelled to anſwer* (10) *to the ſaid writ in form aforeſaid returned, &c.*

And

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life, remainder to his firſt and other ſons in tail, remainder to E. for life, and his firſt and other ſons in tail, remainder to the teſtator's right heirs; B. died, C. entered, and being heir at law of A. the teſtator, and having the reverſion in fee in him expectant on the ſeveral eſtates in himſelf, and D. and E. entered into a bond and died without iſſue, and afterwards D. and E. died without iſſue, ſo that the contingent uſes never happened, and the reverſion veſted in poſſeſſion in F. who was the heir at law of the teſtator and of the obligor; and on debt againſt F. upon this bond as heir of C. the obligor, and *riens per deſcent* pleaded, the court was of opinion that the reverſion being veſted in poſſeſſion in F. was aſſets and chargeable with the bond. The authority of this caſe was queſtioned by *Lord Thurlow* in the *Marchioneſs of Tweedale* v. *Earl of Coventry*. 1 Brown. C. C. 240. where H. deviſed lands to R. for life, remainder over in tail, remainder to his own right heirs, and died. R. the tenant for life entered, and being the heir of H. had the reverſion in fee expectant on the eſtate tail, and died indebted by bond and other ſpecialties, and the remainder in tail being extinct, the reverſion in fee veſted in the heir of R. in poſſeſſion, and one of the queſtions was whether the reverſion was aſſets in the heir of R. to ſatisfy his ſpecialty debts. *Lord Thurlow* did not give any judgment upon that queſtion, but expreſſed himſelf not ſatisfied with the deciſion in *Smith* v. *Parker*. It appears from *Mr. Juſtice Blackſtone*'s report that no caſes were cited, and therefore perhaps the court was not aware of the caſe of *Gifford* v. *Barber*, 4 Vin. Abr. 452, 453. MSS. Rep. S. C. cited in *Cunningham* v. *Moody*. 1 Veſ. 174, 175. in which *Lord Hardwicke* ſeems to be of a contrary opinion. There D. C. being ſeiſed in fee ſettled the eſtate on himſelf for life, remainder to G. C. for life, remainder to his firſt and other ſons in tail, with ſeveral remainders over in the ſame manner in ſtrict ſettlement reverſion to himſelf in fee, and died; G. C. entered, and being heir at law of D. C. was ſeiſed for life together with the reverſion in fee expectant, and confeſſed a judgment, and died without iſſue; the other perſons in remainder died without iſſue, and the reverſion coming into poſſeſſion in a perſon who was the heir both of D. C. and G. C. the queſtion was, whether it was liable to the judgment confeſſed by G. C. *Lord Hardwicke* was of opinion it was, becauſe, being the eſtate of inheritance of G. C. he might grant, incumber or leaſe it for any number of years, or charge it by a judgment or ſtatute: that in *Kellow* v. *Rowden* the queſtion was whether the plaintiff had properly charged the defendant as immediate heir to his father, or whether he ought not to have charged him as heir to the nephew, and ſtated ſpecially the intermediate deſcent; but it was not doubted that

And thereupon he the ſaid *John Jeffreſon*, the now plaintiff, for the having of ſpeedier juſtice in this behalf, prays the writ of our lord the king to be directed to the ſheriffs of *London* to make known to the ſaid *Richard Jackſon* to be before our ſaid lord the now king in his ſaid chancery, to ſhew if any thing, &c. why he, the ſaid *John Jeffreſon*, the now plaintiff, ought

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Plaintiff prays a writ of ſcire facias againſt R. J.

that the reverſion in fee, which took place in the ſecond ſon in poſſeſſion, was veſted in the firſt ſon, and that he might have charged it with a ſtatute, judgment or recognizance, or might have made a leaſe for years of it, and it would have come to the brother ſubject to the charges or leaſe—*That the ſtating of that proved the difference*, and that it would not be liable *to the bond of G. C. as aſſets by deſcent, becauſe that cannot be where there is an intermediate eſtate, but muſt be where the heir takes as immediate heir to the anceſtor that entered into the bond.* That on *a judgment*, the terre-tenant of the land which was in the perſon who confeſſed the judgment is chargeable, but he is not ſo by his bond, unleſs the land came as aſſets by deſcent to the very heir of the obligor. So in *Hargrave's* Co. Litt. 11. b. n. (3.) there is a note of *Lord Hale* to this effect, (*viz.*) "grandfather, father and ſon; grandfather dies, the father is bound in an obligation or warranty, and dies before entry. Held that the ſon is not liable, becauſe he ſhall make himſelf heir to the grandfather;" and 24 Edw. 3. is cited; and though the page is not mentioned, it is probably 24 Edw. 3. 47. abridged Bro. *aſſets per deſcent* 19. "By *Thorp*, the heir ſhall not render in value for the warranty of his anceſtor, if the aſſets do not come from the ſame anceſtor who made the deed; as if the grandfather be ſeiſed, and the father makes a warranty to J. N. of other land and die, and afterwards the grandfather die ſeiſed; the ſon ſhall not render this land in value, for the father was not ſeiſed thereof, and the ſon has it as immediate heir to the grandfather: and where there is grandfather, father and ſon, *the grandfather* lets the land for life, and the father warrants other land, the grandfather dies, and the father is ſeiſed of the reverſion and dies, the tenant for life dies, the heir ſhall not render in value for this land, for the father was not ſeiſed of the land;" but *Broke* adds a *quære inde*, "for a reverſion is good aſſets as it is ſaid elſewhere;" but by *Welby*, "if the *father* had been ſeiſed and let for life, and died in the life time of the tenant for life, it is good aſſets to bind the heir." *Broke* has abridged the ſame caſe in title *Recovery in value* 13, without any *quare*; and it is alſo abridged in *Fitz-Recovery in value* 14. who adds, "*quod nota.*" In *Rooke* v. *Clealand*, 1 Lutw. 503. S. C. 1 Ld. Raym. 53. a bond was made by a perſon who was ſeiſed only of a reverſion in fee expectant on an eſtate for life, and it was held to be aſſets in the hands of the heir during the continuance of the eſtate for life. That caſe was this; huſband and wife ſeiſed in fee in right of the wife, had iſſue a ſon and a daughter, the wife died, and the huſband on her death was

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ought not to have execution againſt him of the debt aforeſaid, to be levied of the ſaid dwelling houſe, with the appurtenances whereof he is above ſuppoſed to be tenant, together with the ſaid tenements, with the appurtenances whereof the ſaid *John*, *Humphry*,

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tenant for life by the curteſy, reverſion to his ſon in fee; the ſon entered into a bond, and died, leaving a daughter, who died without iſſue, leaving her aunt her heir; and in an action on the bond againſt the aunt in the life time of the tenant by the curteſy, the court was of opinion that the reverſion was aſſets, and gave judgment for the plaintiff. This does not ſeem to differ from the other caſes on this ſubject, for the aſſets deſcended immediately on the defendant as heir from the ſame perſon who made the deed, and there is no intermediate eſtate here as there was in *Ciſſard* v. *Barber*, and under thoſe circumſtances its being a reverſion ſeems to make no difference. Therefore the caſe of *Smith* v. *Parker*, may perhaps be found to be of doubtful authority; and ſince the writing of theſe obſervations, the authority of it has ſince been denied in *Doe* v. *Hutton*, 3 Boſ. & Pull. 643. 648. 651. The editor has compared the caſe in the report with the paper book which was delivered to one of the learned judges who then ſat upon the bench, and it appears by it, and alſo by a ſhort note taken by him on the paper book, that the caſe is correctly ſtated by *Mr. Juſtice Blackſtone*, and that the court

(5) Theſe words, "or at any time after," are held eſſential by *Lord Hale*, (note (a) F. N. B. 595.) who cites in ſupport of his opinion 46 Edw. 3. 29. Fitz. Brief 695. where it is ſaid, "there is another fault in the writ, for it only mentions the warning of the tenants of was of opinion the reverſion was aſſets.

the conuſor's lands generally, which may be as well *before* as *after* the recognizance, and no land is liable to execution *but ſuch as the conuſor had on the day of the recognizance, or after.*" S. P. Bro. Recognizance 4. 9.

Any judge of the courts at *Weſtminſter* may take a recognizance at common law, in term or out of term, and in any county in *England*. Bro. Recognizance 20. Vaugh. 102, 103. 2 Ld. Raym. 1141. 11 Mod. 53. So the lord chancellor or keeper may take ſuch recognizance, and award execution. And although enrolment is neceſſary to the validity of a recognizance, yet it bound the lands at the common law *from the time of the caption;* for it is the acknowledgment that gives a recognizance its force as a record, and the enrolment is for ſafe cuſtody and the notifying of it to others. Hob. 195, 196. *Hall* v. *Winckfield*. 1 Vent. 360. in *Berry* v. *Bowes*. Dy. 306. b. 1 Roll. Abr. 892. pl. 11. 2 Roll. Abr. 393. But now by the ſtatute of frauds 29 Car. 2. c. 3. ſ. 18. it is enacted, "that the day of the month and year of the enrolment of recognizances ſhall be ſet down in the margin of the roll where the recognizances are enrolled; and no recognizance ſhall bind any lands, tenements, or hereditaments in the hands of any purchaſer *bona fide*, and for valuable conſideration, *but from the time of ſuch enrolment.*" There is no preciſe time fixed for the enrolment of recognizances at common law; but it ſeems neceſſary they ſhould be enrolled within ſix months by the

equity

Humphry, *Thomas*, *Richard*, and *Alexander* are above reſpectively returned tenants, and it is (11) granted to him, &c. wherefore the ſheriffs of *London* aforeſaid are commanded, that by good, &c. they make known to the ſaid *Richard Jackſon*, that he be before our ſaid lord the now king in his ſaid chancery, on the octave of *St. Hilary* next coming wheresoever, &c. to ſhew in form aforeſaid, and that they have there

Writ iſſued.

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equity of the ſtatute 27 Eliz. c. 4. ſ. 7 and 8. which requires that recognizances in the nature of ſtatutes merchant and ſtatutes ſtaple taken according to the ſtatute 23 H. 8. c. 6. ſhould be entered within ſix months next after their being acknowledged; and that if the conuſees ſhall not deliver them to the clerk of recognizances within four months next after their being acknowledged in order to be entered, they ſhall be void againſt purchaſers for valuable conſideration. The proviſion in the ſtatute of frauds has in general the effect of occaſioning a ſpeedy enrolment of recognizances; however, if the conuſees neglect to enrol them within the time limited, they are conſidered in equity in the nature of debts by bond only. 1 P. Will. 334. *Bothomly* v. *Lord Fairfax*. So with reſpect to judgments; by the common law a judgment related to the firſt day of the term, though ſigned after; and the plaintiff was entitled to have execution of the lands which the defendant was ſeiſed of on the firſt day of the term, or after, although he had aliened them *bona fide* before execution, or they were extended upon a ſtatute acknowledged after. 30 Edw. 3. 24. 1 Roll. Abr. 892. pl. 12, 13, 14, 15, 16. 2 Inſt. 395. Bro. Elegit. 17. 19. 1 Brownl. 38. 8 Mod. 310. *Graves* v. *King*. But now by ſtatute 29 Car. 2. c. 3. ſ. 13, 14, and 15, reciting, "that it had been found miſchievous that judgments in the king's courts at *Weſtminſter* did many times relate to the firſt day of the term whereof they were entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged, or ſuffered and ſigned in the vacation time after the ſaid term, whereby many times purchaſers found themſelves aggrieved;" it is enacted, "that any judge or officer of any of his majeſty's courts of *Weſtminſter* that ſhall ſign any judgments, ſhall, at the ſigning of the ſame, without fee for doing the ſame, ſet down the day of the month and year of his ſo doing upon the paper book, docket, or record which he ſhall ſign; which day of the month and year ſhall be alſo entered upon the margent of the roll of the record where the ſaid judgment ſhall be entered, and ſuch judgments, as againſt purchaſers *bona fide* for valuable conſideration of lands, tenements, or hereditaments, to be charged thereby, *ſhall in conſideration of law, be judgments only from ſuch time as they ſhall be ſo ſigned*, and ſhall not relate to the firſt day of the term whereof they are entered, or the day of the return of the original, or filing the bail." And by ſtatute 4 and 5 W. and M. c. 20, reciting that great miſchiefs

and

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there the names of thoſe by whom, &c. the ſame day is given as well to the ſaid *John Jeffreſon*, the now plaintiff, as to the ſaid *John*, *Humphry*, *Thomas*, *Richard*, and *Alexander*, there, &c. At which day before our ſaid lord the now king in his ſaid

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and damages happen and come as well to perſons in their life times, but more often to their heirs, executors, and adminiſtrators, and alſo to purchaſers and mortgagees, by judgments entered upon record in the courts at *Weſtminſter* againſt the perſons defendants, by reaſon of the difficulty there is in finding out ſuch judgments, it enacts that all judgments ſhall be doggeted in the manner therein mentioned, and by ſection 3. it is further enacted, "that no judgment not doggeted and entered in the manner preſcribed by the act, ſhall affect any lands or tenements as to purchaſers or mortgagees, or have any preference againſt heirs, executors, or adminiſtrators, in their adminiſtration of their anceſtors, teſtators, or inteſtates eſtates." It has been held that, in the adminiſtration of the anceſtors or teſtators eſtate, a judgment not doggeted purſuant to this ſtatute, is to be conſidered only as a ſimple contract debt, and on the iſſue of *plene adminiſtravit* an executor may give in evidence that he has applied all the aſſets in payment of bond or ſimple contract debts before the commencement of the action. 6 Term Rep. 384. *Hickey* v. *Hayter*. And if an heir or executor ſhould plead to an action on a bond or ſimple contract an outſtanding judgment, the plaintiff may reply that it was not doggeted and entered according to the proviſions of the ſtatute. 1 Boſ. & Pull. 307. *Steel* v. *Rorke*.

(6) The words "*ſaid recovery*" were uſed in a *ſcire facias* on a recognizance, inſtead of "*ſaid recognizance*," and on demurrer they were held to be ſurpluſage, and the demurrer over-ruled, 3 Mod. 251. *Ayres* v. *Huntingdon*.

(7) In 2 Salk. 598. *Panton* v. *Hall*, the return of the ſheriff was held ill, becauſe it was that A. B. and C. were tenants of lands, inſtead of tenants of *all* the lands in his bailiwick; but the preſent return ſeems proper without the word "*all*," becauſe it is afterwards averred that there were no other tenants of the conuſor in his bailiwick whom he could warn.

(8) As the *ſcire facias* is to warn the heir and tenants, regularly the return ought to take notice of him, as that he is dead, or there is no heir within the ſheriff's bailiwick, or that he was warned. We have already ſeen that the heir is chargeable only as tenant; if therefore the heir be ſeiſed of any part of his anceſtor's lands, and the conuſee omit to join him in the *ſcire facias* with the other tenants; or if he be joined, and the ſheriff take no notice of him in his return to the *ſcire facias*; the tenants may take advantage of the omiſſion in the manner mentioned hereafter in note (10.) but it is aided after verdict by the ſtatute of jeofails. Cro. Car. 295, 312. *Eyres* v. *Taunton*. S. C. *Sir W. Jones*, 319. See the form of the return. Lil. Ent. 385.

(9) By *tenants*, tenentes generally is meant the owners of the fee-ſimple, and by occupiers, thoſe who come in under

ſaid chancery here, to wit, at *Weſtminſter* aforeſaid, come as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *John*, *Humphry*, *Thomas*, *Richard*, and *Alexander*, by their ſaid attornies, and the ſheriffs of *London* aforeſaid, to wit, F. C. and J. F. now here return that, by E. M. and J. C. good and lawful men of their bailiwick, they had made known to the ſaid *Richard Jackſon*, tenant of the ſaid dwelling houſe with the appurtenances in their bailiwick, that he ſhould be before our ſaid lord the king in his chancery here on this day, to ſhew

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under them; that *tenant* is ſo taken appears by the writ *de curiâ claudendâ* which is a writ of right and lies only for a tenant of the fee. F. N. B. 297. and therefore a preſcription is well pleaded by alleging that the *tenants* of ſuch a cloſe have from time immemorial been accuſtomed to repair, &c. 1 Salk. 336. *Star* v. *Rookeſby*. S. P. Cro. Jac. 665, 666. *Holbach* v. *Warner*. Palm. 331. 2 Roll. Rep. 288. S. C.

(10) The reaſon of this plea ſeems to be, becauſe every tenant of the land is intitled to have contribution, that is, all the lands of the conuſor, or defendant to the judgment, in the hands of the ſeveral purchaſers muſt be extended and equally charged; therefore unleſs *all* the tenants be warned, the others are not obliged to anſwer; and if the tenant does not take advantage of the omiſſion in the firſt inſtance by a plea of this ſort, which he may do notwithſtanding the ſheriff's return, he loſes the benefit of contribution, or of relief by an *auditâ querelâ*, in caſe execution is taken out againſt his land alone. Cro. Jac. 506. *Michel* v. *Croſt*. Moor. 525. *Clerk* v. *Hardwick*, for he cannot plead it after a plea in bar. *Sir W. Jones*. 319 *Eyres* v. *Cowly*. Poſt. 210. (e) 210. (f.) note. If a *ſcire facias* be againſt the *heir* alone, it is ſaid that he is not intitled to receive contribution from a purchaſer; which ſeems rather unaccountable, as the heir is chargeable only as tenant of the land; but if there be ſeveral heirs, ſuch as parceners, heirs in gavelkind, or borough engliſh, and one only be charged, he is intitled to contribution from the other heirs, and therefore may plead this plea. 3 Rep. 12, 13. *Sir W. Harbert*'s caſe. This plea muſt not be pleaded in abatement when the terre-tenant omitted is tenant of lands in another county, becauſe the ſheriff has done his duty in ſummoning the terre-tenants in his county; and therefore the plaintiff muſt ſue out a new writ directed to the ſheriff of the other county where the lands, &c. lie, and the plea muſt not conclude with praying "*that the writ may be quaſhed*," but "*if the defendant ought to be compelled to anſwer*," as in this entry; and it ought not to allege that they are *not named*, or *not returned*. But where the terre-tenants not returned are of lands in the *ſame* county, the precedents are both ways: though even if it be pleaded in the form of a plea in abatement, it muſt not be underſtood that the court can give judgment to abate the writ, becauſe there is no defect in the writ, but only to ſtay till the other terre-tenant is brought in: but the better form in that caſe is to pray judgment,

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ſhew according to the exigency of the ſaid writ, as by the ſaid writ they were commanded. And the ſaid *Richard Jackſon* by *William Longvill* his attorney likewiſe comes, and thereupon he the ſaid *John Jeffreſon* the now plaintiff brings (12) here into court the letters teſtamentary of the ſaid *John Jeffreſon* the teſtator, by which it ſufficiently appears to the court here, that he the ſaid *John Jeffreſon* the new plaintiff is executor of the ſaid will, and has the adminiſtration thereof, and he prays, that as well the ſaid *John, Humphry, Thomas, Richard,* and *Alexander,* as the ſaid *Richard Jackſon,* may anſwer to the ſaid ſeveral writs aforeſaid ſued out againſt them reſpectively, &c. Whereupon it is ſaid by the court here to the ſaid *Richard Jackſon,* that he anſwer to the ſaid writ ſued out againſt him; and it is likewiſe ſaid by the court here to the ſaid *John, Humphry, Thomas, Richard,* and *Alexander,* that they further anſwer to the writs aforeſaid ſued out againſt them under ſeal, &c.

Profert of letters teſtamentary.

Plea by R. D. and A. O.

And the ſaid *Richard Dawſon* and *Alexander Orpwood* ſay, that the ſaid *John Jeffreſon* executor of the laſt will and teſtament of the ſaid *John Jeffreſon* deceaſed in the ſaid writ named ought not to have execution of the ſaid dwelling houſes with the appurtenances mentioned in the return of the writ of *ſcire facias,* againſt them the ſaid *Richard* and *Alexander* for the debt aforeſaid by virtue of the ſaid recognizance; becauſe they ſay, that before the day of the acknowlegment of the debt aforeſaid by the ſaid *Robert Yarway* in the ſaid writ of *ſcire facias* named, one *Thomas Smith* was

That T. S. before the recognizance was ſeiſed of the houſes, whereof defendants are returned tenants in fee,

ſeiſed

judgment, "*if the defendant ought to be compelled to anſwer.*" 2 Vent. 104, 105. *Poynne* v. *Sloughter.* 2 Salk. 601. *Adams* v. *Savage.* S. C. 2 Ld. Raym. 1253. 6 Mod. 199 226. Moor. 524. *Clerk* v. *Hardwick.* Ibid. 571. pl. 783. Ibid. 429 *Greſham*'s caſe. Cro. Eliz. 506. S. C. Co. Ent. 624. a. Ow. 134. *Kempe* v. *Laurence.* This plea is referred to as being a good precedent. 2 Salk. 601.

(11) Hence it appears that upon ſuch plea the plaintiff may take a new writ againſt other terre-tenants; and ſo is Moor. 525. *Clerk* v. *Hardwick.*

(12) As this writ is brought by an executor, it ſeems neceſſary to make a profert of the letters teſtamentary in the middle or at the end of it, but uſually at the end, as in this caſe. Carth. 69. *Boſworth* v. *Ridgley.* S. C. 1 Show. 60. Lill. Ent. 386.

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ſeiſed of the ſaid dwelling houſes with the appurtenances in his demeſne as of fee; and being ſo thereof ſeiſed afterwards, to wit, on the 20th day of *June* in the year of our lord 1666, (13) enfeoffed the ſaid *Robert Yarway*, in the ſaid writ above-named, and one *Thomas Yarway*, of the ſaid dwelling houſes with the appurtenances, to have and to hold to the ſaid *Robert Yarway* and *Thomas Yarway* their heirs and aſſigns, to the uſe of them the ſaid *Robert* and *Thomas* their heirs and aſſigns for ever; by virtue of which ſaid feoffment, they the ſaid *Robert Yarway* and *Thomas Yarway* were ſeiſed of the ſaid dwelling houſes with the appurtenances in their demeſne as of fee; and being ſo thereof ſeiſed, he the ſaid *Robert Yarway* afterwards, to wit on the 1ſt day of *Auguſt* in the 14th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the pariſh of *St. Clement Danes* aforeſaid, in the county aforeſaid died; (14) *without this*, that the ſaid *Robert Yarway*, at the time of the acknowlegment of the debt aforeſaid to the ſaid *John Jeffreſon* deceaſed in the writ of *ſcire facias* above-mentioned, was ſole ſeiſed of the ſaid dwelling houſes with the appurtenances in his demeſne as of fee, in manner and form as by the return of the writ of *ſcire facias* aforeſaid is alleged. And this they are ready to verify: wherefore they pay judgment if the ſaid *John Jeffreſon* the now plaintiff, ought to have his execution againſt them for the ſaid debt to be

and enfeoffed the ſaid R. Y. and T. Y. to hold to them and their heirs.

[10]

R. Y. died, note the plea does not ſtate *that T. Y. ſurvived him*, as it ought to have done.

And traverſe that R. Y. was ſole ſeiſed in fee.

(13) A feoffment is never pleaded by *deed*, but this is the conſtant form of pleading it, and therefore there is no need of a profert. See 1 Saund. 9. a. note.

(14) It is not expreſsly alleged in the writ of *ſcire facias* that R. Y. was ſole ſeiſed in fee, but a ſole ſeiſin ſeems neceſſarily implied from the words "which were of the ſaid R. at the time of the recognizance of the ſaid debt or ever after," for the defendants would not otherwiſe be liable: and it is a rule of pleading, that whatever is neceſſarily underſtood, intended and implied, is traverſable as much as if it were expreſsly alleged. As where in replevin the defendant ſaid that A. was ſeiſed in fee of the place in which, &c. and by his command he took the cattle damage feaſant; the plaintiff pleaded that he was ſeiſed in fee of a third part thereof, and traverſed that A. was ſole ſeiſed. The traverſe was held proper, for by pleading that A. was ſeiſed in fee, it muſt neceſſarily be underſtood that he was *ſole* ſeiſed, and therefore the plaintiff not only might but was bound to traverſe the ſole ſeiſin, 2 Salk. 629. *Gilbert* v. *Parker*. S. C. 6 Mod. 158.

(15) The

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Plea by J. M. H. W. and T. R.

be levied of the ſaid dwelling houſes whereof they are above reſpectively returned tenants.

And the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* ſay, that the ſaid *John Jeffreſon* executor of the laſt will and teſtament of the ſaid *John Jeffreſon* deceaſed in the ſaid writ named ought not to have execution of the ſaid dwelling houſes ſituate in *Gray's Inn Lane* with the appurtenances, in the return of the ſaid writ of *ſcire facias* mentioned, againſt them the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas* for the debt aforeſaid by virtue of the ſaid recognizance, becauſe they ſay that, long before the day of the ſaid recognizance by the ſaid *Robert Yarway* in the ſaid writ of *ſcire facias* named, one *Ralph Henſby*, eſq. was ſeiſed of the ſaid dwelling houſes with the appurtenances in his demeſne as of fee, and the ſaid *Ralph* being ſo thereof ſeiſed afterwards, to wit, on the 28th day of *May*, in the year of our lord 1657, at the pariſh of *St. Andrew* in *Holborn* in the county of *Middleſex*, by a certain indenture of bargain and ſale made between the ſaid *Ralph* of the one part, and one *William Warne* of the other part, (one part of which ſaid indenture ſealed with the ſeal of him the ſaid *Ralph*, they the ſaid *John Morton*, *Humphry*, and *Thomas Richardſon* bring here into court, the date whereof is the ſame day and year aforeſaid) for a certain ſum of money in the ſaid indenture mentioned, he the ſaid *Ralph Henſby* bargained and ſold to the ſaid *William Warne* the ſaid dwelling houſes with the appurtenances, to have and to hold the ſaid tenements with the appurtenances to the ſaid *William Warne* his executors, adminiſtrators and aſſigns, from the day next before the date of the ſaid indenture unto the full end and term of one year from thence next following and fully to be complete and ended; by virtue of which ſaid bargain and ſale the (15) ſaid *William Warne* was poſſeſſed of the ſaid

That before the recognizance R. H. was ſeiſed of the dwelling houſes whereof defendants are returned tenants in fee.

and being ſo ſeiſed by indentures of leaſe and releaſe, conveyed the premiſes to W. W. in fee in truſt for the ſaid R. Y.

Leaſe and releaſe ſet out.

(15) The form of pleading a leaſe for a year now uſed differs from the above only in this, that after the words "by virtue of which ſaid bargain and ſale," are added the following, "and by force of the ſtatute made for transferring uſes into poſſeſſion."

(16) So

ſaid tenements with the appurtenances; and being ſo thereof poſſeſſed, and the ſaid *Ralph* being ſo ſeiſed of the reverſion of the ſaid dwelling houſes, afterwards and before the ſaid day of the acknowlegement of the debt in the writ mentioned, to wit, on the 29th day of *May* in the ſaid year of our lord 1657, at the pariſh aforeſaid, in the county aforeſaid, by his [11] certain writing of releaſe then and there made between the ſaid *Ralph Henſby* of the one part, and the ſaid *William Warne* of the other part, (one part whereof ſealed with the ſeal of him the ſaid *Ralph*, they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* bring here into court, the date whereof is the ſame day and year aforeſaid,) he the ſaid *Ralph Henſby* granted, remiſed, releaſed, and quit claimed unto the ſaid *William Warne* his heirs and aſſigns the aforeſaid dwelling houſes with the appurtenances, then being in the poſſeſſion of the ſaid *William Warne*, to have and to hold the aforeſaid dwelling houſes to the ſaid *William Warne* his heirs and aſſigns, to the uſe of him the ſaid *William Warne* his heirs and aſſigns for ever, in truſt for the ſaid *Robert Yarway* and his heirs; by virtue of which ſaid releaſe, (16) he the ſaid *William Warne* was ſeiſed of the ſaid dwelling houſes with the appurtenances in his demeſne as of fee, in truſt (17) for the ſaid *Robert Yarway* and his heirs. And the ſaid *William Warne* being ſo thereof ſeiſed, he the ſaid *William Warne* afterwards, to wit, on the 28th day of *November* in the 14th year of the reign of our lord *Charles* now king of *England*, &c. at the pariſh of *St. Andrew Holborn* aforeſaid in the county aforeſaid, by a certain indenture of bargain and ſale made between

W. W. afterwards conveyed the premiſes to defendants in fee.

(16) So in the preſent form of pleading a releaſe, the ſame words, "and alſo by force of the ſtatute for transferring uſes into poſſeſſion," are added after the words, "by virtue of which ſaid releaſe."

(17) At the common law if one man was ſeiſed of the legal eſtate to the uſe of, or according to the modern phraſe, in truſt for another, who had acknowleged a recognizance, or againſt whom a judgment had been obtained, theſe lands were not liable to execution upon the judgment or recognizance of the *ceſtui que truſt*. Co. Litt. 374. b. But by the ſtatute of frauds 29 Car. 2. c. 3. ſ. 10. it is enacted "that it ſhall be lawful for any ſheriff or other officer to whom any writ or præcept is directed at the ſuit of any perſon, of, for and upon any

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between the ſaid *Robert Yarway* and the ſaid *William Warne*, and one *William Sallowes*, and one *Thomas Yarway* of the one part, and them the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* of the other part, (one part of which ſaid indenture ſealed with the ſeals of them the ſaid *Robert Yarway*, *William Warne*, *William Sallowes*, and *Thomas Yarway*, they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* bring here into court,) and in due manner enrolled in the court of chancery of our lord the king at *Weſtminſter* on the 6th day of *December* in the 14th year aforeſaid according to the form of the ſtatute in ſuch caſe made and provided; for a certain ſum of money in the ſaid indenture mentioned, bargained, and ſold to them the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* and their heirs the ſaid dwelling houſes with the appurtenances, to have and to hold the ſaid dwelling houſes with the appurtenances, to the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* their heirs and aſſigns for ever, to the uſe of them the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* their heirs and aſſigns for ever; by virtue of which ſaid bargain and ſale,(18) they the ſaid *John*

(18) ſee note (15)

any judgment, ſtatute or recognizance, to do, make and deliver execution unto the party in that behalf ſuing, of all ſuch lands, tenements, rectories, tithes, rents and hereditaments, as any other perſon or perſons are in any manner of wiſe ſeiſed or poſſeſſed in truſt for him againſt whom execution is ſo ſued, like as the ſheriff or other officer might or ought to have done, if the ſaid party againſt whom execution was ſued had been ſeiſed of ſuch lands, &c. of ſuch eſtate as they are ſeiſed of in truſt for him *at the time of the ſaid execution ſued*; which lands, &c. by virtue and force of ſuch execution ſhall accordingly be held and enjoyed freed and diſcharged from all incumbrances of ſuch perſon or perſons as ſhall be ſo ſeiſed or poſſeſſed in truſt for the perſon againſt whom ſuch execution ſhall be ſued; and if any ceſtui que truſt ſhall die, leaving a truſt in fee-ſimple to deſcend to his heir, then and in every ſuch caſe, ſuch truſt ſhall be deemed and taken, and is hereby declared to be aſſets by deſcent, and the heir ſhall be liable to and chargeable with the obligation of his anceſtor for and by reaſon of ſuch aſſets as fully and amply as he might or ought to have been, if the eſtate in law had deſcended to him in poſſeſſion in like manner as the truſt deſcended. The words in the act, "at the time of the ſaid execution ſued," are held to refer to the ſeiſin of the truſtee; and therefore if he

has

John Morton, *Humphry Wiggan*, and *Thomas Richardſon*, were, and ſtill are ſeiſed of the ſaid dwelling houſes with the appurtenances in their demeſne as of fee; *without this*, that the ſaid *Robert Yarway*, at the time of the acknowledgment of the ſaid debt to the ſaid *John Jeffreſon* deceaſed, in the writ of *ſcire facias* above-mentioned, or at any time after, was ſeiſed of the ſaid

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And traverſe the ſeiſin of R. Y. at the time of the recognizance.

has conveyed the lands by the direction of *ceſtui que truſt* before execution, though ſeiſed in truſt at the time of the judgment, the lands cannot be taken in execution. As where a judgment was obtained againſt a *ceſtui que truſt*, who afterwards borrowed a ſum of money, and the truſtee by his direction mortgaged the eſtate to the lender, and an *elegit* being taken out upon the judgment, and a moiety of the eſtate mortgaged, extended and delivered to the plaintiff, he brought an ejectment, and the queſtion was if he had any title by virtue of this ſtatute; and after argument it was determined by *Mr. Juſtice Tracy* that the execution was not good; and *Sir Edward Northey* ſaid, that ever ſince the act ſuch conſtruction had been thought agreeable to the ſtatute, though he did not know it had ever been judicially determined; and a caſe was mentioned by *Mr. Juſtice Tracy* from *Mr. Serjt. Cheſhire*'s notes, where this opinion ſeemed to have been allowed by *Lord Trevor*, and was not contradicted by the court. Com. Rep. 226, *Hunt* v. *Coles*. The ſame point is recognized by *Chief Baron Comyns*, Dig. Execution (C. 14.) It is held that if a man be *ceſtui que truſt* of a term, it is not aſſets within the ſtatute, for it extends only to a truſt of land in fee. 2 Vern. 248. *King* v. *Ballett*.

With reſpect to what ſhall be ſaid to be an uſe executed by the ſtatute of 27 H 8. c 10. of uſes, or a truſt eſtate now not executed, it is held, that where an uſe is limited upon an uſe, it is not executed, but the legal eſtate is veſted in him to whom the firſt uſe is limited. Dy. 155. As where an eſtate is conveyed to another in the manner mentioned above in this entry, viz to W. and his heirs to the *uſe* of him and his heirs, in truſt for, or to the uſe of R. and his heirs, the uſe is not executed in R. but in W. and the legal eſtate is veſted in him as truſtee. Caſ. Temp. Talb. 164. *Robinſon* v. *Comyns*. Ibid. 138, 139. *Attorney-General* v. *Scot*. So where E. made a ſettlement to the uſe of himſelf and his heirs until his then intended marriage, and afterwards to the uſe of his wife for life; and after her death *to the uſe of* truſtees and their heirs during the life of E. upon truſt to permit him to take the profits, remainder to the firſt and other ſons of the marriage, &c. remainder to the uſe of the heirs of the body of E.; it was adjudged that E. took only a truſt eſtate for life, for the uſe to him could not execute upon the uſe which was limited to the truſtees for his life, and conſequently the legal eſtate for his life was executed in them by the ſtatute of uſes, and the limitation to the heirs of the body of E. operated as words of purchaſe, and created a contingent remainder. Carth. 272. *Tippin* v. *Coſin*, S. C. Comber. 312, 313. 1 Ld. Raym.

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ſaid dwelling houſes with the appurtenances in his demeſne as of fee, in manner and form as by the return of the ſaid writ of *ſcire facias* is alleged; and this they are ready to varify; wherefore they pray judgment, if the ſaid *John Jeffreſon* the now plaintiff

Raym. 33. 4 Mod. 380. So where ſomething is to be done by the truſtees which makes it neceſſary for them to have the legal eſtate, ſuch as payment of the rents and profits to another's ſeparate uſe, or of the debts of the teſtator, or to pay rates and taxes and keep the premiſes in repair, or the like, the legal eſtate is veſted in them, and the grantee or deviſee has only a truſt eſtate. See 3 Bos. & Pull. 178, 179. *Kenrick* v. *Beauclerk*. As where lands were deviſed to truſtees and their heirs in truſt for A. a married woman and her heirs, and that the truſtees ſhould from time to time pay the rents and profits to A. or to ſuch perſon as ſhe by any writing under her hand, as well during coverture, as being ſole, ſhould appoint, without the intermedling of her huſband, who he willed ſhould have no benefit or diſpoſal thereof; and as to the inheritance of the premiſes in truſt for ſuch perſon and for ſuch eſtates as A. by her will or other writing under her hand ſhould appoint, and for want of ſuch appointment in truſt for her and her heirs. The queſtion was whether this was an uſe executed by the ſtatute, or a bare truſt for the wife; and the court held it to be a truſt only and not an uſe executed by the ſtatute. 1 Vern. 415. *Nevil* v. *Saunders*. So where lands were deviſed to truſtees and their heirs in truſt to pay out of the rents and profits ſeveral legacies and annuities, and to pay all the reſidue of the rents and profits to C. a married woman during her life for her ſeparate uſe, or as ſhe ſhould direct, and after her death the truſtees to ſtand ſeiſed to the uſe of the heirs of her body with remainders over; it was held by *Lord King*, that the uſe was executed in the truſtees during the life of C. who had only a truſt eſtate in the ſurplus of the rents and profits for life, with a contingent remainder to the heirs of her body, and that her eldeſt ſon would take as a purchaſer; for by the ſubſequent words, viz "that the truſtees ſhould ſtand ſeiſed to the uſe of the heirs of the body of C." the uſe was executed in the perſons intitled to take by virtue thereof; and therefore there being only a truſt eſtate in C. and an uſe executed in the heirs of her body, theſe different intereſts could not unite and incorporate together ſo as to create an eſtate tail by operation of law in C. And he took a difference between the principal caſe and that of *Broughton* v. *Langley*, (hereafter noticed), for there it was to permit A. to receive the rents and profits for life, but in the principal caſe it was a truſt *to pay over* the rents and profits to another, and therefore the eſtate muſt remain in the truſtees to perform the will. 8 Vin. 262. pl. 19. MS. Rep. *Lady Jones* v. *Lord Say & Seal*, S. C. 1 Equ. Cas. Abr. 383, 384. and this decree was affirmed in the houſe of lords. 3 Bro. C. P. 458. See 3 Bos. & Pull. 179. So where lands were deviſed to truſtees and their heirs in truſt *to pay* out

plaintiff ought to have his execution againſt them for the ſaid debt, to be levied of the ſaid dwelling houſes, whereof they are above reſpectively returned tenants, &c.

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And the ſaid *Richard Jackſon* ſays, that the ſaid *John Jefferſon*,

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out of the rents and profits, *after deducting rates, taxes, and repairs*, the reſidue to C. S. for life, and after his deceaſe to the uſe of the heirs male of the body of C. S. with remainder over; it was held by Lord *Thurlow*, that the uſe was executed in the truſtees during the life of C. S. who had only a truſt eſtate for life, and the remainder in tail was a legal eſtate, which could not unite and incorporate together, and C. S. could not ſuffer a valid recovery; for in order to make a good tenant to the præcipe, there muſt either be a legal eſtate for life, and a legal remainder in tail, or an equitable eſtate for life, with an equitable remainder in tail. 1 Bro. C. C. 75. *Shapland* v. *Smith*. And again in a late caſe, where a deviſe was to truſtees and their heirs upon truſt, to permit a married woman to receive the rents and profits during her life *for her own ſole and ſeparate uſe*, notwithſtanding her coverture, *and without being in any wiſe ſubject to the debts, or control of her then or after taken huſband*, and her receipt alone to be a ſufficient diſcharge, with remainder over; it was held that the legal eſtate was veſted in the truſtees; for it being the intention of the teſtator to ſecure to the wife a ſeparate allowance, free from the control of her huſband, it was eſſentially neceſſary that the truſtees ſhould take the eſtate with the uſe executed in order to effectuate that intention, otherwiſe the huſband would be entitled to receive the profits and defeat the very object which the teſtator had in view. 7 Term. Rep. 652. *Harton* v. *Harton*. And alſo where lands were deviſed to truſtees and their heirs in truſt, that they ſhould, out of the rents and profits, or by ſale or mortgage of the whole, or ſo much of the eſtate as ſhould be neceſſary, raiſe a ſum ſufficient to pay the teſtator's debts and legacies, and afterwards in truſt and to the uſe of T. B. for life, with ſeveral remainders over, the queſtion was whether the legal eſtate veſted in the truſtees; Lord *Hardwicke* was of opinion that the deviſe to the truſtees and their heirs carried the *whole fee* to them, and therefore the eſtate for life, as well as the eſtates in remainder, were merely truſt eſtates in equity; that part of the truſt was to ſell the whole or a ſufficient part of the eſtate for the payment of debts and legacies, which would carry a fee by conſtruction, though the word heirs were omitted in the deviſe, as in *Shaw* v. *Weigh*. 1 Eq. Caſ. Abr. 184.; for the truſtees muſt have a fee in the whole eſtate to enable them to ſell, becauſe, it being uncertain what they may ſell, no purchaſer could otherwiſe be ſafe; that the only doubt he had was on the caſe of *Lord Say & Seal* v. *Lady Jones*, before Lord *King*, and affirmed in the houſe of lords as to that point; but on examination that caſe differed in a material part; and taking together all the clauſes of that will, it amounted only to a deviſe to truſtees and their heirs during another's

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freſon, executor, cannot have his execution againſt him for the ſaid debt of the tenements aforeſaid, whereof he is above returned tenant, becauſe he ſays, that he the ſaid *Richard* is not (19) tenant of the ſaid tenements as of freehold, nor was he on

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another's life, upon which a legal remainder might be properly limited. 1 Vez. 143. *Bagſhaw* v. *Spencer*. S. C. 2 Atk. 246. 570. And it was taken for granted in *Garth* v. *Baldwin*, 2 Vez. 646. that a deviſe to truſtees and their heirs in truſt, to pay the rents and profits to another veſted the legal eſtate in the truſtees. For in general the diſtinction is, that where the limitation to truſtees and their heirs is *in truſt to receive the rents and profits and pay them over* to A. for life, &c. this uſe to A. is not executed by the ſtatute, but the legal eſtate is veſted in the truſtees to enable them to perform the will; but where the limitation is to truſtees and their heirs in truſt, *to permit and ſuffer A. to receive* the rents and profits for his life, &c. the uſe is executed in A. unleſs it be neceſſary the uſe ſhould be executed in the truſtees to enable them to perform the truſt, as in the caſe of *Harton* v. *Harton* above mentioned. As where lands were deviſed to truſtees and their heirs, *to the intent and purpoſe to permit A.* to receive the rents and profits for his life, and after that the truſtees ſhould ſtand ſeiſed to the uſe of the heirs of the body of A. with a proviſo, that A. with the conſent of the truſtees, might make a jointure on his wife; it was held that this was an uſe executed in A. and not a truſt eſtate, for it would have been a plain truſt at common law, and what was a truſt of a freehold or inheritance at common law, is executed by the ſtatute which mentions the word *truſt* as well as uſe; and the caſe of *Burchett* v. *Durdant*, 2 Vent. 312. adjudged to the contrary upon this point was denied to be law. 1 Lutw. 814. 823. *Broughton* v. *Langley*, S. C. 2 Ld. Raym. 873. 2 Salk. 679. And the ſame diſtinction was taken by Lord *Kenyon* in the caſe of *Doe* on the demiſe of *Woodley* v. *Pickard*, *Stafford* Summer Aſſizes 1797, and by *Mr. Juſtice Lawrence* in *Jones* v. *Proſſer*, *Worceſter* Spring Aſſizes 1798. The ſtatute of uſes is not held to extend *to copyhold eſtates*, for it is againſt the nature of their tenure that any perſon ſhould be introduced into the eſtate without the conſent of the lord. Gilb. Ten. 170. *nor to leaſes for years* which are actually in exiſtence at the time of their being aſſigned to the uſe; as where A. poſſeſſed of a leaſe for years, aſſigns it to B. to the uſe of C. all the eſtate is in B. and C. takes only a truſt, or equitable eſtate. But if A. ſeiſed in fee makes a feoffment to the uſe of B. for a term of years, the term is ſerved out of the ſeiſin of the feoffee, and is executed by the ſtatute. It is the ſame if he bargains and ſells the eſtate of which he is ſeiſed in fee for a term of years. Dy. 369. a. and in the margin. 2 Inſt. 671.

(19.) This *general* plea of non-tenure to a *ſcire facias* on a judgment in debt or other perſonal action, or on a recognizance, is held to be bad and demurrable to; the reaſon ſeems to be, becauſe it

on the day of ſuing out the writ of *ſcire facias* of him the ſaid *John Jeffreſon*, or at any time after; and this he is ready to verify; wherefore he prays judgment of the return aforeſaid, &c.

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And the ſaid *John Jeffreſon* executor, as to the ſaid plea of the ſaid *Richard Dawſon* and *Alexander Orpwood*, above pleaded in bar of the ſaid execution, ſays, that he by any thing before alleged, ought not to be barred from having his execution, becauſe he ſays, that well and true it is, that long before the day of the recognizance by the ſaid *Robert Yarway*, he the ſaid *Thomas Smith* was ſeiſed of the ſaid dwelling houſes, with the

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admits that T. S. was ſeiſed in fee.

it is contrary to the return of the ſheriff, who ſays he has warned the defendant, who is tenant of certain lands, &c.; but the defendant is at liberty to plead a *ſpecial nontenure*, that is, he may ſay that, before the judgment or recognizance, T. S. was ſeiſed in fee, and demiſed the lands to him for a term yet to come, and traverſe that on the day of ſuing out the writ of *ſcire facias*, or at any time after, he was tenant as of freehold of the lands; or he may ſay that he is only tenant by elegit, or ſtatute, and the like: and it is ſaid that the diſtinction between a plea of general and ſpecial nontenure is now ſettled, after long and great difficulty. 2 Salk. 601. *Adams* v. *Savage*, S. P. Cro. Eliz. 872. *Flud* v. *Penington*. 3 Lev. 205. *Barret* v. *Trotman*. The form of pleading a ſpecial nontenure is to be found in Co. Ent. 620. a. & poſt. 20.

The tenant may plead in bar to the *ſcire facias* any thing which ſhews his lands not liable to execution; as that the perſon againſt whom the judgment was given, or the conuſor, conveyed the lands to him, or ſome other under whom he claims, *before* the judgment or recognizance, with a traverſe of the ſeiſin at the time of the judgment or recognizance, or at any time after. The conveyance muſt be made *bona fide*; for if iſſue be taken on the traverſe, and the conveyance be found fraudulent, the verdict will be againſt the defendant. As where A. recovered judgment in debt againſt B. who died, and to a *ſcire facias* brought againſt the tertenant, he pleaded that B. had enfeoffed him in fee long before the judgment, and traverſed that B. was ſeiſed at the time of the judgment or ever after; and iſſue being taken thereon, the jury found the feoffment, but ſaid it was made of covin to defraud the plaintiff and other creditors; and it was adjudged for the plaintiff, for B. remained ſtill ſeiſed as againſt the creditors notwithſtanding the feoffment; and the covin was properly given in evidence upon this iſſue, though it would not have been admiſſible upon the iſſue of *feoffavit vel non*, any more than the ſtatute of uſury can be given in evidence to avoid a deed on the plea of *non eſt factum*. Hob. 72. *Humberton* v. *Howgil*. So the tenant may plead that the defendant to the judgment or the conuſor was not ſeiſed in fee. Theſ. Brev. 272, 273, 289.

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and that he enfeoffed R. Y. and T. Y. in fee.

the appurtenances, whereof they are above returned tenants, in his demeſne as of fee, and being ſo thereof ſeiſed afterwards and before the recognizance enfeoffed the ſaid *Robert Yarway* and the ſaid *Thomas Yarway*, of the dwelling houſes aforeſaid, with the appurtenances, to have and to hold to the ſaid *Robert Yarway* and *Thomas Yarway*, their heirs and aſſigns, to the uſe of them the ſaid *Robert* and *Thomas*, their heirs and aſſigns, for ever; by virtue of which ſaid feoffment the ſaid *Robert Yarway* and *Thomas Yarway* were ſeiſed of the ſaid dwelling houſes, with the appurtenances, in their demeſne as of fee, as the ſaid *Richard Dawſon* and *Alexander Orpwood* have above in pleading alleged; but the ſaid *John Jeffreſon* executor further ſays, that the ſaid *Robert Yarway* and *Thomas* being ſo ſeiſed of the ſaid dwelling houſes, with the appurtenances, they the ſaid *Robert* and *Thomas*, after the recognizance aforeſaid, to wit, on the 4th day of *July*, in the 14th year of the reign of our lord the now king, at the pariſh of *St. Clement Danes* aforeſaid, by their certain indenture, bearing date the ſame day and year aforeſaid, then and there made between them the ſaid *Robert Yarway* and *Thomas Yarway* of the one part, and the ſaid *Richard Dawſon* and *Alexander Orpwood* of the other part, (one part of which ſaid indenture, ſealed with the ſeals of the ſaid *Robert Yarway* and *Thomas Yarway*, and afterwards and within ſix months then next following duly enrolled of record in the court of chancery of our ſaid lord the now king, at *Weſtminſter* here, they the ſaid *Richard Dawſon* and *Alexander Orpwood* now bring here into court,) for and in conſideration of a certain ſum (20) of money by the ſaid *Richard Dawſon* and *Alexander Orpwood* paid to them the ſaid *Robert* and *Thomas Yarway*, bargained and ſold to the ſaid *Richard Dawſon* and *Alexander Orpwood* the aforeſaid dwelling houſes, with the appurtenances, whereof they the ſaid *Richard* and *Alexander* are above returned tenants, to have and to hold to them the ſaid *Richard* and *Alexander*, and their heirs for ever; by virtue of

R. Y. and T. Y. after the recognizance, conveyed the premiſes to R. D. and A. O. in fee, &c.

(20) To plead a bargain and ſale "*for the conſiderations therein mentioned*" generally, without ſhewing it to be for money or valuable conſideration ſeems to be ill on demurrer; but cured by a verdict, or taking iſſue on a collateral fact. 2 Str. 1229. *Sargent* v. *Reed*.

of which ſaid bargain and ſale and enrollment, and alſo by force of a certain act made and provided in the parliament of the lord *Henry* the 8th, late king of *England*, holden at *Weſtminſter*, in the county of *Middleſex*, on the 4th day of *February*, in the 27th year of his reign, for transferring uſes into poſſeſſion, the ſaid *Richard Dawſon* and *Alexander Orpwood* then and alſo at the time of the death of the ſaid *Robert Yarway*, were ſeiſed of the ſaid dwelling houſes, with the appurtenances, whereof they are above as aforeſaid returned tenants, in their demeſne as of fee; whereby a moiety of the ſaid dwelling houſes, with the appurtenances, became and yet is charged and chargeable to the execution of the ſaid *John Jeffreſon*, executor, for the debt aforeſaid, by virtue of the ſaid recognizance; *without this that the ſaid Robert Yarway died ſeiſed of the ſaid dwelling houſes with the appurtenances, in manner and form as the ſaid Richard Dawſon and Alexander Orpwood have above in pleading alleged.* And this he is ready to verify: wherefore he prays judgment and execution againſt them for the debt aforeſaid to be levied of a moiety of the ſaid dwelling houſes, with the appurtenances, to be adjudged to him, &c.

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whereby a moiety of the ſaid premiſes became and is chargeable to execution.

This traverſe is held to be immaterial and bad. See poſt. 28.

And the ſaid *John Jeffreſon* executor, as to the plea of the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, ſays, that he by any thing by them above in pleading alleged ought not to be barred from having his ſaid execution againſt them for the ſaid debt to be levied of the ſaid dwelling houſes, with the appurtenances, whereof they are above returned tenants, becauſe he ſays that the ſaid *Robert Yarway*, after the ſaid recognizance, to wit, on the ſaid 16th day of *Auguſt*, in the aforeſaid 12th year of the reign of our ſaid lord the now king, was ſeiſed of the ſaid dwelling houſes, with the appurtenances, whereof they the ſaid *John*, *Humphry*, and *Thomas* are above returned tenants, in his demeſne as of fee, in manner and form as by the return of the ſaid writ of *ſcire facias* is above ſuppoſed; and this he prays may be inquired of by the country, and the ſaid *John*, *Humphry*, and *Thomas* thereof likewiſe, &c.

Replication to the plea of J. M. H. W. and T. R.

that R. Y. was ſeiſed of the ſaid dwelling houſes in fee and iſſue

And the ſaid *Richard Dawſon* and *Alexander Orpwood* ſay, that the plea of the ſaid executor above in replying pleaded,

Demurrer to firſt replication

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and the matter in the ſame contained are not ſufficient in law for him to have his ſaid execution maintained againſt them of the ſaid lands and tenements whereof they as aforeſaid are returned tenants, and that they have no neceſſity, nor are they bound by the law of the land in any manner to anſwer to the ſaid plea in manner and form aforeſaid above in replying pleaded: and this they the ſaid *Richard* and *Alexander* are ready to verify; wherefore, for want of a ſufficient replication in this behalf, they the ſaid *Richard* and *Alexander* pray judgment, and that the ſaid executor may be barred from having or maintaining his ſaid execution againſt them the ſaid *Richard* and *Alexander*, for the ſaid 4000l. of the ſaid lands and tenements whereof they are returned tenants as aforeſaid.

Joinder in demurrer.

And the ſaid *John Jeffreſon* executor, as to the demurrer in law of the ſaid *Richard Dawſon* and *Alexander Orpwood*, ſince he has above in pleading alleged ſufficient matter in law to maintain his having his execution aforeſaid againſt the ſaid *Richard Dawſon* and *Alexander Orpwood* for the ſaid debt, to

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be levied of the moiety aforeſaid, with the appurtenances, which he is ready to verify: which ſaid matter the ſaid *Richard Dawſon* and *Alexander Orpwood* do not deny, nor in any wiſe anſwer the ſame, but altogether refuſe to admit the ſaid verification as before, prays judgment and execution againſt them for the ſaid debt, to be levied of a moiety of the ſaid dwelling houſes, with the appurtenances, to be adjudged to him, &c.

Venire facias.

Therefore, as to try the ſaid iſſue above in form aforeſaid joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff is commanded that he cauſe to come before our lord the now king, in three weeks from the day of *Eaſter* next coming, whereſoever he ſhall then be in *England*, twelve free and lawful men of the neighbourhood of the pariſh of *St. Andrew, Holborn*, each of whom ſhall have 20l. of land, tenements or rent by the year at leaſt, by whom the truth of the matter may be better known, and who are neither any wiſe a kin to the ſaid *John Jeffreſon*, the now plaintiff, nor to the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, to recognize upon their oath the full truth of and upon the premiſes; the ſame day is given to the parties aforeſaid there, &c.

In general the venire facias is abbreviated in the entry thus, "12 &c. by whom, &c. and who neither, &c. to recognize, &c."

&c. and as to the matter in law, whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood*, have put themſelves on the judgment of the court here, a day is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood*, before our ſaid lord the now king, in the ſaid three weeks from the ſaid day of *Eaſter* next coming wherefoever, &c. to hear their judgment thereof, &c. becauſe the court here is thereof not yet, &c. And as to the plea of the ſaid *Ricard Jackſon* above pleaded, he the ſaid *John Jeffreſon* the now plaintiff prays leave to imparl thereto before our ſaid lord the now king unto the ſame term whereſoever, &c. and he has it, &c. the ſame day is given to the ſaid *Richard Jackſon* there, &c. at which day before our lord the king at *Weſtminſter*, come the parties aforeſaid in their proper perſons, and as to the trial of the ſaid iſſue above in form aforeſaid, joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff returns the ſaid writ in all things ſerved and executed, together with a panel of the names of the jurors annexed to the ſaid writ, none of whom, &c. therefore the ſheriff is commanded that he do diſtrain them by all their lands, &c. and that of the iſſues, &c. ſo that he have their bodies before our lord the king on the morrow of the *Holy Trinity* whereſoever, &c. to recognize in form aforeſaid; the ſame day is given to the parties there, &c. And as to the matter in law, whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* have put themſelves therein upon the judgment of the court, becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes put upon the judgment of the court, a further day thereof is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood*, before our lord the king until the ſaid morrow of the *Holy Trinity* whereſoever, &c. to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king here is thereof not yet, &c. And as to the ſaid plea of the ſaid *Richard Jackſon* above-pleaded, he the ſaid *John Jeffreſon* the now plaintiff, further

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A continuance by *dies datus* as to the demurrer.

Imparlance as to the plea of R. J.

Diſtringas.

Further continuance of the demurrer.

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prays

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prays leave to imparl thereto before our lord the king until the ſame term whereſoever, &c. and he has it, &c. the ſame day is given to the ſaid *Robert Jackſon* there, &c. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid in their proper perſons; and as to the trial of the ſaid iſſue above in form aforeſaid joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff has not ſent his writ thereof; therefore as before the ſheriff is commanded that he diſtrain them by all their lands, &c. and that of the iſſues, &c. ſo that he may have their bodies before our lord the king in three weeks from the day of *St. Michael* whereſoever, &c. to recognize upon their oath more fully the truth of and upon the premiſes; the ſame day is given to the ſaid parties, &c. And as to the matter in law, whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* have put themſelves upon the judgment of the court, for that it appears to the court of our ſaid lord the now king here that the ſaid plea of the ſaid *John Jeffreſon* the now plaintiff, in manner and form aforeſaid above in replying pleaded, and the matter in the ſame contained, are good and ſufficient in law to maintain him the ſaid *John Jeffreſon* to have his execution againſt the ſaid *Richard Dawſon* and *Alexander Orpwood* for the ſaid 4000l. to be levied of a moiety of the ſaid lands and tenements whereof they the ſaid *Richard Dawſon* and *Alexander Orpwood* are returned tenants as aforeſaid, it is conſidered that the ſaid *John Jeffreſon* the now plaintiff have his execution againſt the ſaid *Richard Dawſon* and *Alexander Orpwood* for the ſaid 4000l. to be levied of a moiety of the ſaid lands and tenements, whereof they the ſaid *Richard Dawſon* and *Alexander Orpwood* are returned tenants as aforeſaid, according to the force, form, and effect of the ſaid recognizance, &c. but let execution thereon be ſtaid until the plea between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, *Thomas Richardſon*, and *Richard Jackſon*, be determined, &c. And as to the ſaid plea of the ſaid *Richard Jackſon* above pleaded, he the ſaid *John Jeffreſon* the now plaintiff further prays leave to imparl thereto until the

Further imparlance to the plea of R. J.

Vicecomes non miſit breve.

Alias diſtringas.

Replication good.

Judgment for the plaintiff.

Ceſſet executio.

Further imparlance to the plea of R. J.

the ſaid three weeks from the day of *St. Michael* whereſoever &c. and he has it, &c. and the ſame day is given to the ſaid *Richard Jackſon* there, &c. At which day before our lord the king at *Weſtminſter*, come as well the ſaid *John Jeffreſon*, the now plaintiff, as the ſaid *John Morton*, *Humphry Wiggan*, *Thomas Richardſon*, and *Richard Jackſon*, in their proper perſons; and as to the trial of the ſaid iſſue above in form aforeſaid joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff has not ſent the writ thereof; therefore, as before the ſheriff is commanded that he diſtrain the jurors aforeſaid by all their lands, &c. ſo that he have their bodies before our lord the king on the octave of *St. Martin* whereſoever, &c. unleſs our lord the king's faithful and beloved *Sir John Kelynge*, knt. chief juſtice of our lord the king, aſſigned to hold pleas in the court of our ſaid lord the king, before the king himſelf, ſhall firſt come on Friday on the morrow of *St. Martin* next to come, at *Weſtminſter*, in the county of *Middleſex*, in the great hall of pleas there, for default of jurors, &c. the ſame day is given to the ſaid parties, &c. And as to the ſaid plea of the ſaid *Richard Jackſon*, above pleaded, he the ſaid *John Jeffreſon* the now plaintiff, prays further leave to impart thereto before our lord the king until the ſaid octave of *St. Martin* whereſoever, &c. and he has it, &c.; the ſame day is given to the ſaid *Richard Jackſon*, there, &c. At which day before our lord the king at *Weſtminſter*, come the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, in their proper perſons; and the ſaid chief juſtice before whom, &c. ſent here his record before him had in theſe words, to wit: Afterwards on the day and at the place within contained before *Sir John Kelynge*, knt. chief juſtice of our lord the king, aſſigned to hold pleas in the court of our ſaid lord the king, before the king himſelf, *John Squire*, gent. being aſſociated to him according to the form of the ſtatute, &c. come as well the within named *John Jeffreſon* the now plaintiff, as the within written *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, in their proper perſons; and the jurors of the jury whereof mention is within made being called, ſome of them,

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[16]

Vicecomes non miſit breve.

Another diſtringas.

Niſi prius.

Further imparlance to the plea of R. J.

Poſtea.

to

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to wit, E. H., G. P., A. C., B. D., R. D., T. S., T. C., T. P., and T. S., come and are ſworn upon that jury; and becauſe the reſt of the jurors of the ſame jury do not appear, therefore others of the by-ſtanders by the ſheriff of *Middleſex* choſen for this purpoſe, at the requeſt of the ſaid *John Jeffreſon*, and by the command of the ſaid chief juſtice, are appointed anew, whoſe names are annexed to the panel within written, according to the form of the ſtatute in ſuch caſe made and provided, which ſaid jurors ſo appointed anew, to wit, D. B., T. J., and J. B., being called likewiſe come, who being elected, tried, and ſworn to ſpeak the truth of the within contained, together with the ſaid other jurors, before impanelled and ſworn, ſay upon their oath that the ſaid *Robert Yarway*, after the recognizance within ſpecified, to wit, on the 16th day of *Auguſt*, in the 12th year of the reign of our ſaid lord the now king within ſpecified, was ſeiſed of the ſaid dwelling houſes with the appurtenances, whereof they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* are within returned tenants, in his demeſne as of fee, in manner and form as the ſaid *John Jeffreſon* the now plaintiff, has within in pleading alleged. Therefore it is conſidered that the ſaid *John Jeffreſon* the now plaintiff, have his execution againſt the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* for the ſaid 4000l. to be levied of the ſaid dwelling houſes with the appurtenances, whereof they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, are above returned tenants as aforeſaid, according to the force, form, and effect of the ſaid recognizance, &c. And thereupon he the ſaid *John Jeffreſon* the now plaintiff, freely here in court acknowleges that he will not any further proſecute againſt the ſaid *Richard Jackſon*, therefore let the ſaid *Richard* be thereof quit, and go thereof without day, &c.

Verdict for plaintiff.

Judgment for plaintiff.

[17]

Nolle proſequi as to R. J.

A vacatur by rule of court was made on *Monday* next after five weeks of *Eaſter*, in the 22d year of king *Charles* the 2d.

The old roll was not extracted, but only a vacatur as appears by the roll, which is entered at the foot of the record, and then the entry is as follows. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid in their proper perſons, and as to the trial of the ſaid iſſue above

in

in form aforeſaid joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff has not ſent thereof the writ; therefore as before the ſheriff is commanded that he diſtrain the jurors of the ſaid jury by all their lands, &c. and that of the iſſues, &c. ſo that he may have their bodies before our ſaid lord the king in three weeks from the day of *St. Michael* whereſoever, &c. to recognize upon their oath more fully the truth of and upon the premiſes; the ſame day is given to the ſaid parties, &c. And as to the matter in law, whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood*, have put themſelves therein upon the judgment of the court, becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes put upon the judgment of the court, a further day thereof is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood*, until three weeks from the ſaid day of *St. Michael* whereſoever, &c. to hear their judgment of and upon the premiſes, for that the court of our lord the king here is thereof not yet, &c. And as to the ſaid plea of the ſaid *Richard Jackſon* above pleaded he the ſaid *John Jeffreſon* the now plaintiff further prays leave to imparl thereto until the ſaid three weeks from the ſaid day of *St. Michael* whereſoever, &c. and he has it, &c. the ſame day is given to the ſaid *Richard Jackſon*, &c. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid in their proper perſons; and as to the trial of the ſaid iſſue above in form aforeſaid joined between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, the ſheriff has not ſent the writ thereof; therefore as before the ſheriff is commanded that he diſtrain the jurors aforeſaid by all their lands, &c. ſo that he may have their bodies before our lord the king on the octave of St. *Martin* whereſoever, &c. unleſs our lord the king's beloved and faithful *Sir John Kelynge* knt. chief juſtice of our lord the king, aſſigned to hold pleas in the court of our ſaid lord the king before the king himſelf, ſhall firſt come on Friday on the morrow of *St. Martin* next coming, at *Weſtminſter*,

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Vicecomes non miſit breve.

Diſtringas iſſued.

Continuance of the demurrer.

Further imparlance as to the plea of R. J.

Vicecomes non miſit breve.

Alias diſtringas.

Niſi prius.

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Weſtminſter, in the county of *Middleſex*, in the great hall of pleas there, for default of jurors, &c. the ſame day is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon*, &c. And as to the matter in law whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* have put themſelves therein on the judgment of the court, becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes put on the judgment of the court, a further day thereof is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood* until the ſaid octave of *St. Martin* wherefoever, &c. to hear their judgment of and upon the premiſes, for that the court of our lord the king here is thereof not yet, &c. And as to the ſaid plea of the ſaid *Richard Jackſon* above pleaded, he the ſaid *John Jeffreſon* the now plaintiff further prays leave to imparl thereunto before our lord the king until the ſaid octave of *St. Martin* wherefoever, &c. and he has it, &c. the ſame day is given to the ſaid *Richard Jackſon* there, &c. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid in their proper perſons, and the ſaid chief juſtice before whom, &c. ſent here his record before him had in theſe words, to wit: Afterwards on the day and at the place within contained, before *Sir John Kelynge* knt. chief juſtice of our lord the king, aſſigned to hold pleas in the court of our ſaid lord the king before the king himſelf, *John Squire* gent. being aſſociated to him according to the form of the ſtatute, &c. come as well the within named *John Jeffreſon* the now plaintiff, as the within written *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* in their proper perſons, and the jurors of the jury whereof mention is within made being called ſome of them, to wit, E. H., G. P., A. C., B. D., R. D., T. S., T. C., T. P., and T. S., come and are ſworn upon that jury; and becauſe the reſt of the jurors of the ſaid jury did not appear, therefore others of the by ſtanders by the ſheriff of *Middleſex* choſen for this purpoſe, at the requeſt of him the ſaid *John Jeffreſon*, and by the command of the ſaid chief juſtice, are appointed anew, whoſe names

Further continuance of the demurrer.

Further imparlance as to the plea of R. J.

Poſtea.

Tales.

are

are annexed to the panel within written, *according to the form* of the ſtatute in ſuch caſe made and provided, which ſaid jurors ſo appointed anew, that is to ſay, D. B., T. J., and T. B., being called likewiſe come, who being choſen, tried and ſworn to ſpeak the truth of the within contained, together with the ſaid jurors before impanelled and ſworn, ſay upon their oath that the ſaid *Robert Yarway*, after the recognizance within ſpecified, to wit, on the 16th day of *Auguſt* in the 12th year of the reign of our ſaid lord the now king within ſpecified, was ſeiſed of the ſaid dwelling houſes with the appurtenances, whereof they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* are within returned tenants, in his demeſne as of fee, in manner and form as the ſaid *John Jeffreſon* the now plaintiff has within in pleading alleged. Therefore it is conſidered that the ſaid *John Jeffreſon* the now plaintiff have his execution againſt the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* for the ſaid 4000l. to be levied of the ſaid dwelling houſes with the appurtenances, whereof they the ſaid *John Morton*, *Humphry Wiggan*, and *Thomas Richardſon* are ſo as aforeſaid returned tenants, according to the force, form and effect of the ſaid recognizance; but let execution thereof ceaſe until the plea between the ſaid *John Jeffreſon* the now plaintiff, and the ſaid *Richard Dawſon* and *Alexander Orpwood* and *Richard Jackſon* be determined, &c. And thereupon the ſaid *John Jeffreſon* the now plaintiff freely here in court confeſſes that he will not any further proſecute againſt the ſaid *Richard Jackſon*, therefore let the ſaid *Richard Jackſon* be thereof quit and go thereof without day, &c. And as to the matter in law, whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* have put themſelves therein on the judgment of the court, becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes put upon the judgment of the court, a further day thereof is given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood*, until the octave of *St. Hilary* whereſoever, &c. to hear their judgment of and upon the premiſes, for that the court of our lord the king here is thereof

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Verdict for plaintiff.

[19]

Judgment for plaintiff.

Ceſſet executio.

Nolle proſequi againſt R. J.

Further continuance to the demurrer.

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thereof not yet, &c. At which day before our lord the king at *Weſtminſter* come as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* in their proper perſons; and as to the matter in law whereof as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood*, have put themſelves therein on the judgment of the court, becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes put on the judgment of the court, a further day is thereof given as well to the ſaid *John Jeffreſon* the now plaintiff, as to the ſaid *Richard Dawſon* and *Alexander Orpwood*, until five weeks from the day of *Eaſter* wherefoever, &c. to hear their judgment of and upon the premiſes, for that the court of our lord the king here is thereof not yet, &c. At which day before our lord the king at *Weſtminſter* come as well the ſaid *John Jeffreſon* the now plaintiff, as the ſaid *Richard Dawſon* and *Alexander Orpwood* in their proper perſons, and thereupon all and ſingular the premiſes being ſeen, and by the court of our lord the king here more fully underſtood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king here, that the ſaid plea of the ſaid *Richard Dawſon* and *Alexander Orpwood* above pleaded in bar of the execution of him the ſaid *John Jeffreſon* the now plaintiff, is not ſufficient in law, and that the replication of him the ſaid *John Jeffreſon* the now plaintiff to the ſaid plea above pleaded, is alſo not ſufficient in law to maintain him the ſaid *John Jeffreſon* to have his ſaid execution, and ſo the demurrer in law thereof following is not aptly joined, therefore it is ſaid to the ſaid *John Jeffreſon* the now plaintiff, and to the ſaid *Richard Dawſon* and *Alexander Orpwood*, that they do replead, &c. that is to ſay, that the ſaid *Richard Dawſon* and *Alexander Orpwood* do anſwer anew to the ſaid writ, and that the ſaid parties do further proceed therein, and that they do deſcend to an iſſue of the country thereon, or plead to the judgment of the court therein. And thereupon the ſaid *Richard Dawſon* and *Alexander Orpwood* ſay, that *John Jeffreſon* executor of the laſt will and teſtament of the ſaid *John Jeffreſon* deceaſed, in the ſaid writ named, ought not to have execution

Further continuance of the demurrer.

[20]

Parties ordered to replead.

Plea by R. D. and A. O.

execution of the ſaid dwelling houſes with the appurtenances, in the return of the writ of *ſcire facias* mentioned for the debt aforeſaid, by virtue of the ſaid recognizance, unleſs of the reverſion thereof, after the end of a certain term of 86 years, being parcel of a term of 99 years, of the ſaid dwelling houſes, demiſed before the day of the ſaid recognizance, and yet unexpired, and at the rent of a grain of pepper to be paid yearly during the ſaid term; becauſe they ſay that, long before the day of the ſaid recognizance acknowledged by the ſaid *Robert Yarway* in the writ of *ſcire facias* named, one T. S. was ſeiſed of the ſaid dwelling houſes with the appurtenances in his demeſne as of fee, and being ſo thereof ſeiſed afterwards, to wit, on the 20th day of *June* in the year of our lord 1656, enfeoffed the ſaid *Robert Yarway* in the ſaid writ above-named, and one *Thomas Yarway*, of the ſaid dwelling houſes with the appurtenances, to have and to hold to the ſaid *Robert Yarway* and *Thomas Yarway* their heirs and aſſigns, to the uſe of them the ſaid *Robert* and *Thomas* their heirs and aſſigns for ever; by virtue of which ſaid feoffment, they the ſaid *Robert* and *Thomas* were ſeiſed of the ſaid dwelling houſes with the appurtenances in their demeſne as of fee, and being ſo thereof ſeiſed, they the ſaid *Robert* and *Thomas* afterwards, and before the day of the ſaid recognizance acknowledged by the ſaid *Robert Yarway*, to wit, on the 4th day of *January* in the year of our lord 1656, at the pariſh of *St. Clement Danes* in the ſaid county of *Middleſex*, by their certain indenture, the date whereof is the ſame day and year, did bargain, ſell and demiſe the ſaid dwelling houſes with the appurtenances to one *William Wymondeſoll* eſq. his executors, adminiſtrators and aſſigns, to have and to hold from the day next before the date of the ſaid indenture, for the ſaid term of 99 years from thence next following, and fully to be complete and ended; yielding therefore yearly to the ſaid *Robert Yarway* and *Thomas Yarway* their heirs, executors, adminiſtrators and aſſigns one grain of pepper, if the ſame ſhould be lawfully demanded; by virtue of which ſaid bargain and ſale, he the ſaid W. W. was poſſeſſed of the ſaid dwelling houſes with the appurtenances for the term aforeſaid, and being ſo thereof

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Executio non.

unleſs of a reverſion.

Becauſe before recognizance.

T. S. ſeiſed in fee,

enfeoffed the ſaid R. Y. and T. Y. in fee.

R. Y. and T. Y. before the recognizance, demiſed the premiſes to one W. W. for 99 years.

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poſſeſſed afterwards, to wit, on the 4th day of *April* in the 16th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the pariſh of *St. Clement Danes* in the ſaid county of *Middleſex*, made his laſt will and teſtament in writing, and thereby appointed *Dawes Wymondeſoll* eſq. executor, and afterwards, to wit, on the 4th day of *April* in the 16th year aforeſaid, he the ſaid W. W. at the pariſh of *St. Clement Danes* aforeſaid, in the county aforeſaid died; after whoſe death the ſaid *Dawes* took upon himſelf the burden of the execution of the ſaid will; by virtue of which will, and of the ſaid indenture of bargain and ſale to the ſaid W. W. in his life time in form aforeſaid made, the ſaid D. as executor of the ſaid W. W. was poſſeſſed of the ſaid dwelling houſes with the appurtenances for the reſidue of the ſaid term of 99 years; and being ſo thereof poſſeſſed, he the ſaid D. afterwards, to wit, on the 8th day of *December* in the 18th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the pariſh of *St. Clement Danes* aforeſaid, in the county aforeſaid, by his indenture, the date whereof is the ſame day and year, aliened and aſſigned to one *Elizabeth Orpwood*, ſpinſter, and her aſſigns, the ſaid dwelling houſes with the appurtenances, to have and to hold to the ſaid *Elizabeth Orpwood* and her aſſigns from the time of the execution of the ſaid laſt mentioned indenture, for the reſidue of the ſaid term of 99 years then to come and unexpired ſo as aforeſaid by the ſaid indenture bargained and ſold to the ſaid W. W.; by virtue of which ſaid laſt mentioned indenture, the ſaid E. O. was poſſeſſed for the reſidue of the ſaid term of 99 years, which was 88 years and 37 days from the time of the execution of the ſaid indenture in form aforeſaid made to the ſaid *Elizabeth*. And being ſo thereof poſſeſſed the ſaid E. afterwards, to wit, on the 21ſt day of *January* in the 19th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the pariſh of *St. Clement Danes* in the county aforeſaid by her certain indenture, the date whereof is the ſame day and year aforeſaid, demiſed and granted the ſaid dwelling houſes with the appurtenances to the ſaid *Richard Dawſon* and *Alexander Orpwood* and their aſſigns, to have and

W. W. made his will, and appointed D. W. executor and died.

D. W. poſſeſſed of the ſaid term.

D. W. aſſigned the premiſes to E. O for the reſidue of the term.

E. O. demiſed the premiſes to R. D. and A. O.

Who entered and are poſſeſſed.

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and to hold the ſaid dwelling houſes to them the ſaid *Richard Dawſon* and *Alexander Orpwood* from the day next before the date of the ſaid laſt mentioned indenture, for the ſaid term of 86 years from thence next following, and fully to be complete and ended; by virtue of which ſaid indenture laſt mentioned, they the ſaid *Richard Dawſon* and *Alexander Orpwood* entered into the ſaid dwelling houſes with the appurtenances, and were and yet are poſſeſſed for the ſaid term of 86 years. And this they are ready to verify; wherefore they pray judgment if the ſaid *John Jeffreſon* ought to have his execution of the ſaid dwelling houſes, unleſs of the reverſion thereof after the end of a certain term of 86 years, being parcel of the ſaid term of 99 years of the ſaid dwelling houſes granted before the day of the ſaid recognizance, and then unexpired, and of the rent of one grain of pepper payable yearly during the ſaid term, &c. (*b*)

(*b*) See Ow. 134. *Kempe* v. *Laurence* Co. Ent. 624. a. 2 Ld. Raym. 1256. *Adams* v. *Savage*.

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Replication.

And the ſaid *John Jeffreſon* executor ſays, that he by any thing by the ſaid *Richard Dawſon* and *Alexander Orpwood* above in pleading alleged, ought not to be barred or delayed from having his execution of the ſaid dwelling houſes with the appurtenances in the return of the ſaid writ of *ſcire facias* mentioned, for the ſaid debt, againſt them the ſaid *Richard Dawſon* and *Alexander Orpwood* by virtue of the ſaid recognizance, becauſe he ſays, that after the making of the ſaid indenture of bargain and ſale of the ſaid dwelling houſes with the appurtenances to the ſaid W. W. in the life time of the ſaid *Robert Yarway*, and alſo in the life time of the ſaid W. W. and before the ſuing out of the ſaid firſt writ of *ſcire facias*, to wit, on the 3d day of *April* in the ſaid 16th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. he the ſaid W. W. at the ſaid pariſh of *St. Clement Danes*, in the ſaid county of *Middleſex*, ſurrendered the ſaid dwelling houſes with the appurtenances to the ſaid R. Y. and T. Y. and their heirs; without this that the ſaid *Dawes Wymondeſoll*, after the death of the ſaid W. W., aliened or aſſigned to the ſaid E. O. the ſaid dwelling houſes with the appurtenances, to have to her the ſaid E. O. and her aſſigns for the reſidue of the ſaid term of 99 years, in manner and form as the ſaid *Richard Dawſon* and *Alexander Orpwood* have above thereof in pleading alleged. And this he is ready to verify; where-

W. W. ſurrendered the premiſes to the ſaid R. Y. and T. Y.

and traverſes that D. W. aſſigned the premiſes to E. O.

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fore he prays judgment and his execution of the ſaid dwelling houſes with the appurtenances in the return of the ſaid writ of *ſcire facias* mentioned, for the debt aforeſaid, by virtue of the ſaid recognizance to be adjudged to him, &c.

Rejoinder.

Takes iſſue on the traverſe.

And the ſaid *Richard Dawſon* and *Alexander Orpwood* as before ſay, that the ſaid D. W. after the death of the ſaid W. W. did alien and aſſign the ſaid dwelling houſes with the appurtenances to the ſaid E. O. and her aſſigns for the ſaid reſidue of the ſaid term of 99 years, in manner and form as the ſaid *Richard* and *Alexander* have above in pleading alleged; and of this they put themſelves upon the country; and the ſaid *John Jeffreſon* the now plaintiff likewiſe, &c. Therefore the ſheriff is commanded that he cauſe to come here before our lord the king on the morrow of all ſouls wherefoever, &c. 12, &c. of the neighbourhood of the pariſh of *St. Clement Danes*, by whom, &c. and who neither, &c. becauſe as well, &c.; the ſame day is given to the parties aforeſaid, &c.

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Caſe 2.

Jeffreſon executor of Jeffreſon againſt Morton, Dawſon and others.

S. C. 1 Sid. 436, 437. 1 Lev. 283. 1 Mod. 28, 29. 2 Keb. 529. 584. 587. 608. 622. 3 Keb. 25. 31. 33. 129. 243.

To a ſcire facias in chancery, on a recognizance acknowledged there, againſt the tertenants of the conuſor, ſome of the defendants plead to iſſue, and the others demur; the record is delivered by the

SCIRE facias out of the petty bag in chancery by *Jeffreſon* executor of *Jeffreſon* againſt *Yarway*, to have execution upon a recognizance, dated the 16th of *Auguſt* in the 12th year of the preſent king, acknowledged by him to the teſtator in chancery for 4000l. The ſheriff returned that *Yarway* was dead; whereupon another *ſcire facias* iſſued againſt the tenants of the lands of *Yarway*, to which the ſheriff returned a *ſcire feci* to *Morton Wiggan*, and *Richardſon*, tenants of two dwelling houſes with the appurtenances in *Gray's Inn Lane*, and alſo to *Dawſon* and *Orpwood* tenants of twelve dwelling houſes in *Shire Lane* in *Middleſex*, which were *Yarway's* at the time of the recognizance, &c. And further, "that there was not any heir, nor were there any other tenant or tenants of any other lands or tenements which were of

of the ſaid *Yarway* to whom he could make known, &c." The defendants on the day of the return of the *ſcire facias*, appeared in chancery, and pleaded "that one *Richard Jackſon*, long before the day of ſuing out the ſaid writ, and always after, was and yet is tenant of a dwelling houſe with the appurtenances in the pariſh of *St. Mary of Aldermanbury*, commonly called by the name of the *Axe Inn*, of which ſaid dwelling houſe the ſaid *Robert Yarway*, namely, the conuſor was ſeiſed in his demeſne as of fee, on the ſaid 16th day of *Auguſt* in the 12th year of the reign of the now king, and that no writ of *ſcire facias* iſſued out of the court here, directed to the ſheriffs of *London* againſt the tenants of the lands of him the ſaid *Robert*," and prayed judgment if they ought to be compelled to anſwer to the writ; and then the entry of the record is in this manner, to wit; "and thereupon he the ſaid *John Jeffreſon* the now plaintiff, for having the more ſpeedy juſtice in this behalf, prays the writ of our lord the king to be directed to the ſheriffs of *London* to make known to the ſaid *Richard Jackſon*, that he be before our ſaid lord the king in his ſaid chancery to ſhew," &c. why the plaintiff ſhould not have execution againſt him for the ſaid debt, to be levied out of the ſaid dwelling houſe together with the other tenements. And thereupon a writ of *ſcire facias* iſſued againſt *Jackſon*, returnable at a certain return, and the ſame day was given as well to the plaintiff as to the defendants, who had appeared and pleaded the above mentioned plea; at which day the plaintiff appeared, and the ſheriff returned the writ ſerved, and *Jackſon* and the other defendants alſo appeared, "whereupon it is ſaid by the court here to the ſaid *Richard Jackſon*, that he do anſwer to the ſaid writ ſued out againſt him, and it is likewiſe ſaid by the court to all the other defendants, that they do further anſwer to the ſaid writ ſued out againſt them under peril," &c. And thereupon the defendants *Dawſon* and *Orpwood* pleaded in bar of execution, that before the entering into the recognizance, one *Thomas Smith* was ſeiſed in fee of the dwelling houſes whereof they were returned tenants; and being ſo ſeiſed, enfeoffed *Yarway* the conuſor, and one *Thomas Yarway* in fee, whereby they were jointly ſeiſed in fee; and being ſo ſeiſed, the conuſor died,

Chancellor to the court of K. B. for the purpoſe of trying the iſſue; the whole record muſt come to the court of K. B. which ſhall give judgment both on the verdict and demurrer, and the record ſhall not be ſent back into chancery. See 3 Bulſt. 225. Blackſtone's caſe. S. C. Sir W. Jones. 82. 92. Latch. 3.

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and therefore, as they intended, though it was not ſo pleaded, the tenements ſurvived to *Thomas Yarway*, and traverſed, "without this that the ſaid *Yarway* the conuſor was ſole ſeiſed of the ſaid dwelling houſes at the time of the recognizance," but did not ſay, "or at any time after," "and this, &c. wherefore, &c." The defendants, *Morton*, *Wiggan*, and *Richardſon*, for the tenements whereof they were returned tenants, pleaded in bar that one *Warne* was ſeiſed in fee in truſt for *Yarway* the conuſor, and, by a conveyance in which the conuſor joined, conveyed to them, and traverſed, "without this that the conuſor was ſeiſed at the time of the recognizance or at any time after," and thereupon iſſue was joined. The defendant *Jackſon* pleaded nontenure, to which the plaintiff imparled; and to the plea of *Dawſon* and *Orpwood* he replied, and confeſſed that the conuſor *Yarway* and *Thomas Yarway* were enfeoffed jointly, but he ſaid that being ſo ſeiſed they, by bargain and ſale indented and enrolled, in conſideration of money, bargained and ſold the tenements to the defendants in fee, whereby they were ſeiſed accordingly, "by means whereof a moiety of the ſaid dwelling houſes with the appurtenances became, and yet is charged and chargeable to the execution of him the ſaid plaintiff, for the ſaid debt by virtue of the ſaid recognizance," and further traverſed, "without this that the conuſor died ſeiſed of the ſaid dwelling houſes, in manner and form as, &c. and this, &c.; wherefore he prays judgment and execution againſt them for the debt aforeſaid, to be levied of a moiety of the ſaid dwelling houſes with the appurtenances to be adjudged to him," &c. To which replication the defendants demurred, and the plaintiff joined in demurrer; and the entire record of the demurrer and of the iſſue together was tranſmitted to the king's bench, and a day given to all the parties here, as well to *Jackſon* upon the imparlance to his plea of nontenure, as to all the other defendants; and in *Trinity* term laſt paſt the defendants making no defence, the plaintiff had judgment on the demurrer, with a *ceſſet executio* until the plea ſhould be determined on the iſſue, and on the plea of nontenure; and in *Michaelmas* term following, the iſſue was tried and found for the plaintiff, and judgment entered thereon, and a *nolle proſequi*

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profequi on the plea of nontenure. And on the laſt day of *Michaelmas* term it was moved that theſe proceedings were irregular; becauſe though an iſſue joined in chancery muſt be tranſmitted here, yet a demurrer is determinable in chancery, and ought not to be removed here; that it was done by the plaintiff's clerk without the knowledge of the lord keeper or of the court of chancery, and that it was a ſurprize upon the defendants, wherefore it was prayed that all the proceedings in this court ſhould be vacated; and the firſt day of this term was given to the plaintiff to ſhew cauſe why the proceedings ſhould not be vacated as was prayed by the defendants. And now in this term it was argued by *Finch* ſolicitor general, and *Saunders* for the plaintiff, and *Jones* for the defendants *Dawſon* and *Orpwood*, who alone controverted this matter; and it was agreed that the proceedings were regular enough in point of practice. But the great queſtion was, whether by law a demurrer can be adjourned out of chancery into this court, becauſe all demurrers joined in chancery ought to be adjudged by the lord keeper or chancellor for the time being, as it was pretended; and in ſupport of it 4 *Inſt.* 80. was cited, where it is ſaid, that if there be a demurrer in law in chancery it ſhall be argued and adjudged in the ſame court, and ſo is the conſtant practice to this day; to which it was anſwered for the plaintiff that it is true where there is a demurrer only, it has been always the practice to determine it in the court of chancery without tranſmitting it into this court, but in the preſent caſe there is a demurrer and an iſſue alſo; and the iſſue muſt neceſſarily be tranſmitted into this court becauſe the chancery cannot try it by a jury. If then the iſſue be tranſmitted into this court, and the demurrer be kept in chancery, there will be two judgments in two ſeveral courts upon one and the ſame record; and yet the plaintiff can have but one execution, namely, one *elegit* upon both judgments; and in that caſe out of which court ſhall he have it? out of chancery or out of the king's bench? for the two courts cannot join in making an execution; ſo that the plaintiff between both courts will fail of his right, which would be inconvenient. And though it has been the practice to adjudge demurrers in law joined in chancery before the lord chancellor,

Queſtion whether a demurrer can by law be adjourned out of chancery into the court of K. B.

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or keeper of the great ſeal in that court, yet the court of chancery may, if it will, adjourn any cauſe either after or before demurrer; as in *Sarnefield's* caſe cited in 8 Rep. 23. a. *the Prince's caſe*, where a *ſcire facias*, upon the ſupplication of the prince, was ſued out of chancery, returnable in the ſame court, to repeal certain letters patent granted by king *Richard* the 2d, and confirmed by king *Henry* the 4th, and the defendant appeared in chancery, and afterwards the parties were adjourned into the king's bench, and they pleaded, and judgment was given there without ſending the record back, though there was not any iſſue joined, but judgment was given by default againſt the defendant after an aid prayer granted, and a *procedendo* awarded; which proves that the chancellor may deliver a record and adjourn the parties into the king's bench out of chancery, whenever he pleaſes, either before or after a demurrer or iſſue joined. And it was farther ſaid, that though it may be objected that the preſent caſe is not ſo entire but that the plaintiff may have two executions, namely, one out of chancery on the demurrer, and the other out of this court on the iſſue, without any inconvenience, yet the rule of this caſe muſt govern all other caſes of a ſimilar nature; and if it ſhall be underſtood that no demurrer can be adjourned here, ſome caſes will be without any remedy. As if a clerk or other officer of chancery bring an action of treſpaſs, or aſſault and battery, againſt two perſons, by an attachment of privilege in chancery according to the uſual practice there, and one defendant plead to iſſue and the other demurs, now the plaintiff is to recover joint damages againſt both; but if the demurrer cannot be tranſmitted into this court as well as the iſſue, how ſhall the plaintiff be able to recover againſt both of them? So if one of the clerks in chancery impleads another there by writ of privilege for an aſſault, battery and wounding, and iſſue is joined on the wounding, and there is a demurrer to the aſſault and battery, now the jury who try the iſſue ought to inquire of the damages on the demurrer; but it cannot be done unleſs the demurrer be adjourned into this court as well as the iſſue. And if it be ſaid that the chancery may firſt adjudge the demurrer, and afterwards tranſmit the iſſue into this

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The chancery may adjourn any cauſe there depending at common law, and tranſmit the record into the K. B. to be determined, either after or before iſſue or demurrer joined.

this court, yet that will not ſerve; for the record of the demurrer muſt of neceſſity come into this court either after or before judgment, becauſe, unleſs the record of the demurrer be tranſmitted into this court, the plaintiff cannot have the damages on the demurrer inquired by the jury who try the iſſue: wherefore it was concluded that in this caſe the record of the demurrer, and iſſue were legally tranſmitted into this court.

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On the other hand it was objected by *Jones* for the defendants, that when an iſſue is joined as to part, and a demurrer to another part in chancery, and the iſſue is tranſmitted here to be tried, after the trial of the iſſue the record ought to be ſent back into chancery for the chancellor or keeper to give judgment there upon it; and no inconvenience will follow, for the court of chancery has then the whole record upon which it may give judgment, and the party will have his entire judgment and execution there. And Lord *Coke* is of this opinion in the fourth part of his Inſtitutes 80. where he ſays expreſsly, that after trial the record muſt be remanded, and judgment given there. [27]

But to this it was anſwered by the other ſide, that the conſtant practice is to the contrary, and though Lord *Coke* is of that opinion, yet the books which he cites in the margin do not warrant any ſuch matter. For there is not any ſuch book as 10 *Edw.* 3. 61. the 10 *Edw.* 3. having only 59 folios: and in the 24 *Edw.* 3. 65. there is nothing to the purpoſe to be found; and the 24 *Edw.* 3. 73. b. the biſhop of *Lichfield* and *Coventry*'s caſe, makes againſt the opinion of Lord *Coke*; for that was a *ſcire facias* on a recognizance in chancery, and the defendant appeared and pleaded a releaſe upon which they were at iſſue, and the record was tranſmitted into the court of K. B. to try the iſſue; the plaintiff was nonſuited, and afterwards brought a new *ſcire facias* in the king's bench upon the record there; and it was objected that he ought to reſort to chancery to ſue his *ſcire facias* there, but the objection was over ruled, and it was adjudged that the plaintiff might bring his *ſcire facias* in the K. B. on the record of nonſuit in that court. Which caſe ſhews that after the

But ſee 10 Edw. 3. pl. 62.

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the nonſuit the record was not ſent back into chancery, but was retained in the king's bench, and judgment given there upon the nonſuit; which is directly againſt the opinion of Lord *Coke*. And it appears in his reports, that if an iſſue be tranſmitted into the king's bench, that court retains it, and will give judgment upon it: as in *Digg*'s caſe, in 1 Rep. 157. and *Steward*'s caſe, cited in 9 Rep. 99. Sir *George Reynell*'s caſe; in both of which caſes, an iſſue being joined in chancery, the record was tranſmitted into the K. B. where ſeveral ſpecial verdicts were found, and the court of K. B. retained the records, and did not ſend them back into chancery, but gave judgment upon the ſpecial verdicts; and ſo is the continual practice at this day. And it is a well known rule, that when a record comes into the king's bench, it is never removed out of that court (1); wherefore it was concluded that the record ſhall not in any caſe be ſent back to the chancery. And the whole court delivered their opinions *ſeriatim*, that the record of the demurrer and iſſue together, and alſo of the imparlance to the plea of *Jackſon*, was well and legally tranſmitted into the king's bench, and that the chancery may adjourn any cauſe there depending at common law, and tranſmit the record of it into this court to be determined, either before or after iſſue or demurrer joined; and that the whole record muſt come here entire, which was proved by *Sarneſield*'s caſe before cited; wherefore they held all the proceedings regular in this caſe, and that they were well done—*Quod nota*—See alſo 7 H. 4. 31. a. pl. 12.

1 Str. 146.

When a record comes into the K. B. it is never removed out of that court.

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And the lord keeper of the great ſeal was alſo of this opinion; for it was moved before him by the defendants by petition, and he was attended by counſel on both ſides before the matter was moved in the king's bench, and on hearing the matter above mentioned, he declared that in his opinion it was

(1) S. P. 1 Roll. Abr. 534. (G.) pl. 2, 3. Bro. Record. 44. 46. All. 14. *Rex* v. *Holland*. S. C. Sty. 20. 40. 75. 76. 84. 90. 94. Bro. Juriſdiction. 48. 1 Roll. Rep. 287. *Biſhop of Briſtol* v. *Proctor*. 1 Salk. 352. *Fazacharly* v. *Baldo*. S. C. 6 Mod. 177, 178.

was proper to tranſmit the entire record as aforeſaid—And ſo the point was ſettled.

But then it was moved for the defendants that they might be heard to the matter of law in the replication of the plaintiff; for they ſaid they were taken by ſurprize before; and this being granted, they objected that the replication was inſufficient in law for the bad traverſe: becauſe when the plaintiff had ſhewn that *Yarway* the conuſor, and the other joint-tenant, had made a bargain and ſale in fee, it ſufficiently confeſſed and avoided the dying ſeiſed alleged by the defendants, and therefore the plaintiff ought not alſo to have traverſed the dying ſeiſed; for though the conuſor had died ſeiſed of a joint eſtate in fee with his companion, yet by the making of the bargain and ſale in his life time, a moiety of the dwelling houſes was charged and bound to the execution of the recognizance, notwithſtanding they had a reconveyance, or diſſeiſed the bargainee, and *Yarway* had afterwards died ſeiſed, and his companion ſurvived him; and therefore the dying ſeiſed in this caſe was not material or traverſable; and of ſuch opinion was the whole court (2) in *Eaſter* term next following: wherefore both ſides agreed by conſent to alter the defendant's plea, and the plaintiff was to reply what he pleaſed, and ſo it was done, and the laſt roll of the caſe was extracted out of part, and a new roll containing the new pleading was added, whereby the whole caſe does not now appear, but at firſt it was as it is mentioned before.

(2) S. P. Dy. 366. a. pl. 36. *Vernon*'s caſe. 1 Saund. 22, 23. *Bennet* v. *Filkins*. Com. Pleader. (G. 3.) Yelv. 151. *Bedell* v. *Lull*. S. C. Cro. Jac. 221. 2 Str. 837. *Rex* v. *Abp. of Armagh*.

Careſwell

Caſe 3. **Careſwell and another againſt Vaughan.**

Eaſter 21 Car. II. Regis. Roll. 74.

Writ of error from the great ſeſſions in Wales to the king's bench.

OUR lord the king has ſent, to his juſtices of his great ſeſſions of his county of *Merioneth*, his writ cloſe in theſe words, that is to ſay; *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to our juſtices of our great ſeſſions of our county of *Merioneth*, greeting: Becauſe in the record and proceedings, and alſo in the giving of judgment, in our court of our ſaid great ſeſſions, in a certain plea of land, between *William Vaughan*, eſq. demandant, and *Eleazer Careſwell* and *Lodwick Owen*, tenants, wherein he the ſaid *William Vaughan* demandant, by our writ of *Quod ei deforceat*, proteſting to proſecute the ſaid writ in the form and nature of our writ of entry *ſur diſſeiſin* at the common law, according to the form of the ſtatute of *Ruthland*, demanded againſt the ſaid *Eleazer Careſwell* and *Lodwick Owen* tenants one meſſuage, 200 acres of land, 20 acres of meadow, 300 acres of paſture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelfynydd*, of which the ſaid *Eleazer* and *Lodwick* deforced him, as it is ſaid, manifeſt error has intervened, to the great damage of them the ſaid *Eleazer* and *Lodwick*, as by their complaint we are informed; we being willing that the error, if any there be, ſhould in due manner be corrected, and full and ſpeedy juſtice done to the ſaid parties in this behalf, do command you, that if judgment be given thereupon, then you ſend to us, diſtinctly and openly under your ſeal, the record and proceedings aforeſaid, with all things concerning the ſame, and this writ, ſo that we may have them on the octave of the purification of the bleſſed *Mary*, whereſoever we ſhall then be in *England*, that the record and proceedings aforeſaid being inſpected, we may cauſe to be further done thereupon, for amending the ſaid error, what of right, and according to the law and cuſtom of our realm of *England*, ought to be done. Witneſs ourſelf at *Weſtminſter*, the 4th day of *December*, in the 20th year of our reign. *Norbury*.

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The writ is thus returned; the record and proceedings whereof

whereof mention is within made, with all things concerning the ſame, follow in theſe words, to wit; *Merionethſhire*, to wit. The great ſeſſions of our lord the king in the county of *Merioneth*, holden at *Dolgelley*, in the ſaid county, before *Timothy Littleton*, ſerjeant at law, juſtice of our lord the king of the great ſeſſions of our lord the king of the county aforeſaid, and *John Griffith*, eſq. one other juſtice of our ſaid lord the king of his great ſeſſions of the county aforeſaid, on *Monday*, to wit, the 8th day of *October*, in the 12th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Merioneth*, greeting: Command *Eleaſer Careſwell* and *Lodwick Owen*, that juſtly and without delay they render to *William Vaughan*, one meſſuage, 200 acres of land, 20 acres of meadow, 300 acres of paſture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelſynydd*, which they the ſaid *Eleazer* and *Lodwick*, unjuſtly deforce him, as it is ſaid, and unleſs they ſhall do ſo, and if the ſaid *William* ſhall make you ſecure of proſecuting his claim, then ſummon by good ſummoners the ſaid *Eleazer* and *Lodwick*, that they appear before the juſtices of our great ſeſſions of your county at our next great ſeſſion of the ſaid county, whereſoever it ſhall be held in your county, to ſhew wherefore they have not done it; and have you there the ſummoners and this writ. Witneſs ourſelves at *Caernarvon*, the 22d day of *September*, in the year of our reign, &c. the 12th: *Bulkely White.*—Pledges of proſecution, *John Doe* and *Richard Roe.*—Summoners, *Dio Den*, *Pio Pen.*—*Richard Anwill*, eſq. ſheriff.

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Merionethſhire, to wit. Pleas at the great ſeſſions of our lord the king in the county of *Merioneth*, holden at *Dolgelley*, in the ſaid county, before *Timothy Littleton*, ſerjeant at law, juſtice of our lord the king of the great ſeſſions of our lord the king in the county aforeſaid, and *John Griffith*, eſq. one other juſtice of our ſaid lord the king of his great ſeſſions in the county aforeſaid, on *Monday*, to wit, the 8th day of *October*, in the 12th year of the reign of our lord *Charles* the 2d, by

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the grace of God, of *Enlgand, Scotland, France,* and *Ireland,* king, defender of the faith, &c.

Merionethſhire, to wit. *William Vaughan,* by the writ of our lord the king of *Quod ei deforceat,* proteſting to proſecute the ſaid writ in the form and nature of the writ of our lord the king of entry *ſur diſſeiſin* in the *quibus,* in nature of the writ of aſſize of *novel eiſſeiſin* at common law, according to the form of the ſtatute of *Ruthland,* demands againſt *Eleazer Careſwell* and *Lodwick Owen,* one meſſuage, 200 acres of land, 20 acres of meadow, 300 acres of paſture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelfynydd,* whereof they the ſaid *Eleazer* and *Lodwick* unjuſtly and without judgment diſſeiſed the ſaid *William* within 20 years now laſt paſt, and which the aforeſaid *Eleazer* and *Lodwick* deforce him, &c. And whereupon the ſaid *William,* by *Evan Vaughan* his attorney, ſays, that he the ſaid *William* was ſeiſed of the ſaid tenements, with the appurtenances in his demeſne as of freehold in time of peace, in the time of our lord the now king, by taking the profits thereof to the value, &c. and of which, &c. and thereupon he brings ſuit, &c.

Demand againſt the tenants.

Count.

Eſplus.

Plea in abatement.

And the ſaid *Eleazer* and *Lodwick,* by *Ellis Hughes* their attorney, come and defend their right when, &c. and ſay that the writ is vitious in itſelf, and not ſued out according to the courſe of the regiſter, for that the ſaid *William,* by his ſaid writ, demands againſt the ſaid *Eleazer* and *Lodwick* one *meſſuage,* which ſaid word "*meſſuage*" is altogether without any ſenſe or meaning, and according to the form of the regiſter it ought to be "*meſuage,*" and that the word "*he*" render in the ſaid writ next after the word "*delay,*" is incongruous and ought to be "*they*" render; and that the "*&c*" inſerted in the ſaid writ between "year of our reign" and "12," is an uſeleſs addition to the ſaid writ, and is not in the form of the writ in the regiſter in ſuch caſe made and provided: wherefore inaſmuch as the ſaid writ in form aforeſaid ſued out is vitious, the ſaid *Eleazer* and *Lodwick* pray judgment of the ſaid writ, and that the ſame may be quaſhed, &c.

That the word "*meſſuage*" is miſ-ſpelt.

"*he*" uſed inſtead of "*they,*" and an uſeleſs "*&c.*"

And

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And the ſaid *William*, by his attorney, ſays, that by any thing by the ſaid *Eleazer* and *Lodwick* to quaſh the ſaid writ above in pleading alleged, the ſaid writ of him the ſaid *William* ought not to be quaſhed, becauſe he ſays that the ſaid plea in manner and form aforeſaid pleaded, and the matter in the ſame contained are not ſufficient in law, to which he has no neceſſity, nor is he bound by the law of the land to anſwer. And this he is ready to verify; wherefore he prays judgment, and that his writ may be adjudged good, &c. Demurrer.

And the ſaid *Eleazer* and *Lodwick*, ſince they have above alleged ſufficient matter in law to quaſh the ſaid writ, which they are ready to verify, which ſaid matter the ſaid *William Vaughan* does not deny, but altogether refuſes to admit that verification, as before, pray judgment that the ſaid writ may be quaſhed. Joinder.

And becauſe the juſtices here will adviſe of and upon the premiſes before they give judgment thereon, a day is given to the ſaid parties here, until *Monday* in the next great ſeſſions of our lord the king in the ſaid county, to hear their judgment thereof, for that the juſtices here are thereof not yet, &c. At which ſaid *Monday* in the ſaid next great ſeſſions of our lord the king in the county aforeſaid, holden at *Dolgelley*, in the ſaid county, before *Timothy Littleton*, ſerjeant at law, juſtice, &c. and *John Griffith*, eſq. one other juſtice, &c. on *Monday*, to wit, the 16th day of *September*, in the 13th year of the reign of our lord the now king, come as well the ſaid *William*, as the ſaid *Eleazer* and *Lodwick*, by their attornies aforeſaid: and becauſe the ſaid juſtices here will further adviſe of and upon the premiſes before they give judgment thereupon, a day is given to the ſaid parties here, until *Wedneſday* in the next great ſeſſions of our lord the king in the ſaid county, to hear their judgment thereon, for that the juſtices here are thereof not yet, &c. At which ſaid *Wedneſday* in the ſaid next great ſeſſions of our lord the king in the county aforeſaid, holden at *Dolgelley* in the county aforeſaid, before *Timothy Littleton*, ſerjeant at law, juſtice, &c. and the ſaid *John Griffith*, eſq. one other juſtice, &c. on *Wedneſday*, to wit, the 9th day of *October*, in the 13th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. come as well the ſaid *William*, as the ſaid *Eleazer* and Continuance. Further continuance.

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Further continuance.

Lodwick, by their attornies aforeſaid: and becauſe the juſtices here will further adviſe of and upon the premiſes before they give judgment thereupon, a further day is given to the parties aforeſaid here, until *Monday* in the next great ſeſſions of our lord the king in the county aforeſaid, to hear their judgment thereon, for that the ſame juſtices here are thereof not yet, &c. At which ſaid *Monday* in the ſaid next great ſeſſions of our lord the king in the county aforeſaid, holden at *Bala* in the ſaid county, before *Timothy Littleton*, ſerjeant at law, juſtice, &c. on *Monday*, to wit, the 18th day of *Auguſt*, in the 14th year of the reign of our lord the now king, &c. come as well the ſaid *William*, as the ſaid *Eleazer* and *Lodwick*, by their ſaid attornies, and thereupon the ſaid plea of the ſaid *Eleazer* and *Lodwick* pleaded to quaſh the ſaid writ of the ſaid *William* being ſeen, and by the juſtices here more fully underſtood, it appears to the ſame juſtices that the ſaid plea in manner and form aforeſaid pleaded, and the matter in the ſame contained, are not ſufficient in law to quaſh the writ of him the ſaid *William*, therefore it is conſidered that the ſaid writ be adjudged good, and that the ſaid *Eleazer* and *Lodwick* do anſwer anew, &c.

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Judgment of reſpondeas ouſter.

Defence of the tenants. Foreign voucher.

And whereupon the ſaid *Eleazer* and *Lodwick*, by their ſaid attorney, come and defend their right when, &c. and thereupon vouch (1) to warranty *John Snell* of *Minhyneall*, in the county

(1) By this is meant when the tenant calls into court another who is bound either to defend the right againſt the demandant, or yield the tenant other land, &c. in value: it extends to lands of freehold or inheritance, but not to any *chattel*, real, perſonal, or mixt; for in the caſe of a chattel intereſt the party cannot vouch though he has a warranty, but may have an action of covenant, if it be by deed; or if by parol, an action upon the caſe, or of deceipt, as the caſe requires. He that vouches is called the voucher, and he that is vouched the vouchee. The vouchee may appear *gratis* and enter immediately into the warranty; but if he do not, a writ of *ſummoneas ad warrantizandum* iſſues, and if the ſheriff return him ſummoned, and he makes default, *a magnum cape ad valentiam* is awarded; and if he makes default again judgment is given againſt the tenant, and for him to have in value over againſt the vouchee. If the vouchee *appears*, and makes default afterwards, a *parvum*

county of *Cornwall*, gent. who hath no lands or tenements within the ſaid county of *Merioneth*, but only in the county of *Cornwall*, by the aid of the court of our ſaid lord the king, &c. and thereupon a day is given by the court here, as well to the ſaid *William*, as to the ſaid *Eleazor* and *Lodwick*, in the plea aforeſaid, &c. here, until *Monday* in the next great ſeſſions

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a *parvum cape ad valentiam* iſſues, and if he makes default again, then the ſame judgment is given as has been juſt mentioned. If the ſheriff return that the vouchee *has nothing*, an *alias* and *pluries* writ of ſummons iſſues, and afterwards a writ of *ſequatur ſub ſuo periculo*; ſo called becauſe the tenant loſes his land without any recompence in value, unleſs he can bring in the vouchee to warrant the land. Therefore, if to the laſt mentioned writ the ſheriff return that the vouchee has nothing, the demandant has judgment againſt the tenant, but he has no judgment to recover over in value, becauſe the vouchee was never warned, and it appears he has nothing. But in the grand *cape ad valentiam*, it appears that the vouchee has aſſets, and a default made by him after ſummons is an implied confeſſion of the warranty. There muſt be nine returns between the *teſte* and return of the *ſummoneas ad warrantizandum*. 2 Inſt. 240. When the vouchee enters into the warranty, he ſtands in the place of the tenant, and the demandant counts againſt him as againſt the tenant, 2 Inſt. 241. But the tenant cannot vouch in an aſſize, for it is *feſtinum remedium*, 2 Roll. Abr. 745. pl. 14. Nor in a writ of entry in the nature of an aſſiſe, Ibid. 745. pl. 15. So in partition the defendant cannot vouch, for the land is not demanded, Moor, 21. pl. 70. So in dower againſt the heir, he cannot vouch, 2 Roll Abr. 745. pl. 11. Nor in a *quod ei deforceat*, for recovery of lands claimed as dower, for it is in the nature of dower, 2 Roll. Abr. 744. (Q.) pl. 2. Nor in a *quare impedit* for danger of a lapſe, Ibid. pl. 6. Nor in ejectment of ward, Ibid. pl. 5. So a man ſhall not vouch in a *ſcire facias* to execute a fine, 2 Roll. Abr. 745. pl. 9. Nor in a *quod permittat* for turning of water, Ibid. pl. 12. And in a writ of intruſion, ſuppoſing the tenant himſelf abated, if he ſays that he is tenant for life, reverſion to J. S. he cannot vouch J. S. becauſe the writ is brought of his own wrong, Ibid pl. 13.

There is a foreign voucher like that in the above entry, where the tenant being impleaded within a particular juriſdiction, as in *London*, *Wales*, and the like, vouches one to warranty, and prays that he may be ſummoned in ſome other county out of the juriſdiction of the court; though it may be more properly called a voucher *of a foreigner called to warranty*, Co. Litt. 101. b. 102. a. Pig. 144. 151. The ſtatute of *Gloceſter* (6 *Edw.* 1.) c. 12. and the ſtatute 9 *Edw.* 2. provide for foreign vouchers by tenants impleaded for lands in *London*, *Cheſter*, *Durham*, *Salop*, &c. See 2 Inſt. 325, 326. And foreign vouchers in *Wales* are regulated by ſtatute 34 and 35 H. 8. c. 26. ſ. 88.

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ſeſſions of our lord the king in the county aforeſaid. At which ſaid *Monday* in the ſaid next great ſeſſions of our ſaid lord the king, in the county aforeſaid, holden at *Bâla*, in the ſaid county, before *Timothy Littleton*, juſtice, &c. on *Monday*, to wit, the 8th day of *October*, in the 14th year of the reign of our ſaid lord the now king, &c. come as well the ſaid *William*, as the ſaid *Eleazor* and *Lodwick*, by their attornies aforeſaid, and thereupon a further day is given by the ſaid court, as well to the ſaid *William* as to the ſaid *Eleazor* and *Lodwick* here, until *Monday* in the next great ſeſſions of our lord the king, in the ſaid county; at which ſaid *Monday* in the ſaid next great ſeſſions of our ſaid lord the king, in the county aforeſaid, holden at *Dologelly*, in the ſaid county, before the ſaid *Timothy Littleton*, juſtice, &c. and *Thomas Jones*, eſq. one other juſtice, &c. on *Monday*, to wit, the 24th day of *September*, in the 15th year of the reign of our ſaid lord the now king, come as well the ſaid *William* as the ſaid *Eleazor* and *Lodwick* by their ſaid attornies. And thereupon he the ſaid *William*, by his ſaid attorney, ſays, that the ſaid *Eleazor* and *Lodwick* ought not to be admitted to vouch to warranty the ſaid *John Snell*, becauſe he ſays that the ſaid *John Snell* is not named in the ſaid writ, wherefore he prays judgment if the ſaid *Eleazor* and *Lodwick* ought to be admitted to ſuch voucher to warranty.

Further day.

Replication. Counterpleads the voucher.

And the ſaid *Eleazor* and *Lodwick*, by their ſaid attorney, ſay, that the counter-plea of the ſaid *William* to the voucher to warranty by them the ſaid *Eleazor* and *Lodwick*, is not ſufficient in law to bar them the ſaid *Eleazor* and *Lodwick* from having the ſaid warranty, and that they to the ſaid counter-plea in manner and form aforeſaid pleaded, have no neceſſity, nor are bound by the law of the land to anſwer. And for cauſes of demurrer in law, according to the form of the ſtatute in ſuch caſe made and provided, they the ſaid *Eleazor* and *Lodwick* ſhew theſe cauſes following, that is to ſay, firſt, becauſe the ſaid counter-plea is neither pleaded, filed, nor of record, at one and the ſame great ſeſſions with the ſaid voucher, nor at the ſecond great ſeſſions next enſuing after filing the ſaid voucher of record in the ſaid court of great ſeſſions; but is filed at the third great ſeſſions after

Demurrer.

Cauſes of demurrer.

the filing of the ſaid voucher: ſecondly, for that the ſaid *William*, in the ſaid counter-plea, does not ſhew to the court here what ſort of writ he intends in the ſaid counter-plea, nor does he ſhew the nature, or parts, or form of the ſaid writ, ſo that it may appear to the court here what ſort of writ he the ſaid *William* intends in the ſaid counter-plea in which the ſaid *John Snell* ought to be named: thirdly, for that the ſaid counter-plea is not verified by the ſaid *William* with any verification whatſoever, whereas in fact it ought to be verified by reference to the record of the ſaid writ, or to ſome other verification: fourthly, for that it is not neceſſary that the ſaid *John Snell* vouched to warranty by the ſaid *Eleazor* and *Lodwick* ſhould be named in the ſaid writ, inaſmuch as upon his voucher to warranty in the ſaid writ he might warrant gratis according to the ſaid voucher, without naming him in the ſaid writ, by his the ſaid *John Snell*'s appearing in perſon in court here ready to warrant according to the ſaid voucher, without any ſummons againſt him the ſaid *John Snell* to have warranty: And this they are ready to verify, wherefore, for want of a ſufficient anſwer to their ſaid voucher, the ſaid counter-plea, in form aforeſaid pleaded, is of no effect, and altogether invalid in law to bar the ſaid voucher, for which and other cauſes exiſting in the counter-plea and record aforeſaid, the ſaid *Eleazor* and *Lodwick* pray judgment, and that the ſaid voucher may ſtand, &c.

Joinder in demurrer.

And the ſaid *William* by his ſaid attorney ſays, that the ſaid counter-plea by him the ſaid *William* in form aforeſaid pleaded, and the matter in the ſame contained, are good and ſufficient in law to bar the ſaid *Eleazor* and *Lodwick* from ſuch their voucher to warranty, and becauſe the ſaid *Eleazor* and *Lodwick* do not anſwer the ſaid counter-plea, nor in any wiſe deny the ſame, he the ſaid *William*, as before, prays judgment if the ſaid *Eleazor* and *Lodwick* ought to be admitted to ſuch voucher to warranty of the ſaid *John Snell*, &c.

Curia adviſare vult.

And becauſe the ſaid juſtices here will adviſe of and upon the premiſes before they give judgment thereon, a day is given to the ſaid parties here until *Monday* in the next great ſeſſions of our lord the king in the county aforeſaid, to hear their judgment thereon, for that the juſtices here are thereof

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not yet, &c. On which ſaid *Monday* in the ſaid next great ſeſſions of our lord the king in the county aforeſaid, holden at *Dologelly*, in the ſaid county, before the ſaid *Timothy Littleton*, ſerjeant at law, juſtice, &c. on *Monday*, to wit, the 5th day of *October*, in the 15th year of the reign of our ſaid lord the now king, &c. come as well the ſaid *William*, as the ſaid *Eleazor* and *Lodwick*, by their attornies aforeſaid; and becauſe the ſaid juſtices here will further adviſe of and upon the premiſes before they give judgment thereon, a further day is given to the ſaid parties here, until *Monday* in the next great ſeſſions of our lord the king in the ſaid county, to hear their judgment thereon, for that the ſaid juſtices here are thereof not yet, &c. On which ſaid *Monday* in the ſaid next great ſeſſions of our lord the king in the county aforeſaid, holden at *Bala*, in the ſaid county, before the ſaid *Timothy*

[34] *Littleton*, ſerjeant at law, juſtice, &c. and *Thomas Jones*, eſq. one other juſtice, &c. on *Monday*, to wit, the 8th day of *Auguſt*, in the 16th year of the reign of our lord the now king, come as well the ſaid *William*, as the ſaid *Eleazor* and *Lodwick*, by their attornies aforeſaid; and becauſe the ſaid juſtices here will adviſe of and upon the premiſes before they give judgment thereon, a further day is given to the ſaid parties here, until *Monday* in the next great ſeſſions of our lord the king in the ſaid county, to hear their judgment thereon, for that the ſaid juſtices here are thereof not yet, &c. (here follow ſeven further continuances in the ſame words

[35] from one great ſeſſions to another.) On which ſaid *Monday* in the ſaid next great ſeſſions of our lord the king in the ſaid county, holden at *Dologelly*, in the ſaid county, before *Timothy Littleton*, ſerjeant at law, juſtice, &c. and *Thomas Jones*, eſq. one other juſtice, &c. on *Monday*, to wit, the 17th day of *Auguſt*, in the 20th year of the reign of our ſaid lord the now king, &c. come as well the ſaid *William*, as the ſaid *Eleazor* and *Lodwick*, by their ſaid attornies; whereupon all

[36] and ſingular the premiſes being ſeen, and by the ſaid juſtices here more fully underſtood, and mature deliberation being firſt thereupon had, and becauſe it ſeems to the ſaid juſtices here, that the voucher to warranty of the ſaid *John Snell*, by the ſaid *Eleazor* and *Lodwick* in the ſaid plea, does not lie,

nor by the law of the land ought to be admitted, therefore it is conſidered by the court here, that the ſaid *William* do recover his ſeiſin againſt the ſaid *Eleazor* and *Lodwick*, of the ſaid tenements, with the appurtenances; and the ſaid *Eleazor* and *Lodwick*, in mercy, &c. And thereupon he the ſaid *William* prays a writ of our ſaid lord the king to be directed to the ſheriff of the ſaid county, as well to cauſe him to have full ſeiſin of the ſaid tenements, with the appurtenances, as to enquire of the damages, &c. and it is granted to him returnable on *Monday* in the next great ſeſſions of our lord the king to be holden in the ſaid county.

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Judgment for plaintiff.

Plaintiff prays a writ of ſeiſin.

Merionethſhire, to wit, warrants of attorney received at the ſaid ſeſſions before the ſaid juſtices, &c.

Warrants of attorney.

Merionethſhire, to wit, *William Vaughan*, demandant, puts in his place *Evan Vaughan*, his attorney, againſt *Eleazor Careſwell* and *Lodwick Owen*, tenants, in a plea of land.

Merionethſhire, to wit, *Eleazor Careſwell* and *Lodwick Owen*, tenants, put in their place *Ellis Hughes*, their attorney, againſt *William Vaughan*, demandant, in a plea of land.

Afterwards, to wit, on *Wedneſday* next after 15 days of *Eaſter* thence next following, before our lord the king at *Weſtminſter*, come the ſaid *Eleazor Careſwell* and *Lodwick Owen*, by *William Walton*, their attorney, and ſay, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this, to wit, that the judgment aforeſaid is given for the ſaid *William Vaughan* againſt the ſaid *Eleazor* and *Lodwick*, whereas by the law of this realm of *England*, the ſaid judgment ought to have been given for the ſaid *Eleazor* and *Lodwick* againſt the ſaid *William Vaughan*, and therefore in that there is manifeſt error; and the ſaid *Eleazor Careſwell* and *Lodwick Owen* pray the writ of our ſaid lord the king to warn the ſaid *William Vaughan* to be before our ſaid lord the king, to hear the record and proceedings aforeſaid, and it is granted to them, &c. by which it is commanded to the ſheriff of *Merionethſhire* aforeſaid, that by good and lawful men of his bailiwick, he make known to the ſaid *William Vaughan* that he be before our lord the king in five weeks from the day of *Eaſter* whereſoever, &c. to hear the record and proceedings aforeſaid,

Aſſignment of errors.

Scire facias

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Ticcomes non ſit breve.

ſaid if, &c. and further to do and receive what the ſaid court of our ſaid lord the king ſhall conſider of him in his behalf; the ſame day is given to the ſaid *Eleazor Careſwell* and *Lodwick Owen*, &c. At which day, before our ſaid lord the king, at *Weſtminſter*, come the ſaid *Eleazor* and *Lodwick*, by their ſaid attorney, and the ſheriff has not ſent the writ thereof; and the ſaid *William Vaughan*, on the ſame day, being ſolemnly called, likewiſe comes by *Andrew Vidian*, his attorney; whereupon they the ſaid *Eleazor* and *Lodwick*, as before ſay, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid there is manifeſt error, by alleging the ſaid errors by them in form aforeſaid alleged; and they pray that the judgment aforeſaid, for the errors aforeſaid, and others, in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing, and that they may be reſtored to every thing which they have loſt by occaſion of the ſaid judgment, and that the court of our ſaid lord the king now here may proceed to examine as well the record and proceedings aforeſaid, as the ſaid matter above aſſigned for error, and that the ſaid *William Vaughan* may rejoin to the ſaid error, &c. Whereupon the ſaid *William Vaughan* ſays, that there is no error either in the record and proceedings aforeſaid, or in giving the judgment aforeſaid; and he prays that the court of our ſaid lord the king here may proceed to examine as well the record and proceedings aforeſaid, as the ſaid matter above aſſigned for error. But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day thereof is given to the ſaid parties before our lord the king, until the morrow of the holy Trinity, to hear their judgment thereupon, &c. for that the court of our ſaid lord the king here is thereof not yet, &c. On which day before our lord the king at *Weſtminſter*, come the ſaid parties, by their ſaid attornies, and becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes, a further day thereof is given to the ſaid parties before our lord the king, until three weeks from the day of *St. Michael* whereſoever, &c. to hear their judgment thereupon, &c.

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In nullo eſt erratum.

Curia adviſare vult.

&c. for that the court of our ſaid lord the king here is thereof not yet, &c. On which day before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid; and becauſe the court of our ſaid lord the king here is not yet adviſed what judgment to give of and upon the premiſes, a further day thereof is given to the ſaid parties before our ſaid lord the king, until the morrow of the purification of the bleſſed *Mary* wherefoever, &c. to hear their judgment thereon, for that the court of our ſaid lord the king here is thereof not yet, &c. On which day before our lord the king, at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid; whereupon, as well the record and proceedings aforeſaid, and the judgment given thereupon, as the cauſe and matter aforeſaid above aſſigned and alleged for error, being ſeen, and by the court of our ſaid lord the king here more fully underſtood, and diligently examined, for that it appears to the court of our ſaid lord the king here, that the ſaid record is not in any thing vitious or defective, and that there is not any error in the ſaid record, it is conſidered that the ſaid judgment be in all things affirmed and ſtand in full force and effect, the ſaid cauſe and matter above aſſigned for error in any wiſe notwithſtanding. And thereupon he the ſaid *William* prays the writ of our lord the king to have full ſeiſin of the ſaid tenements made to him, and it is granted to him, &c. returnable before our lord the king in 15 days from the day of *Eaſter* wherefoever, &c. And the ſaid *William Vaughan* alſo prays the writ of our lord the king to inquire of the (*b*) damages on occaſion of the ſaid diſſeiſin; and becauſe it is not known to the court of our lord the king here what damages the ſaid *William Vaughan* has ſuſtained by reaſon of the ſaid diſſeiſin, the ſheriff is commanded that, by the oath of 12 good and lawful men of his bailiwick, he diligently inquire what damages the ſaid *William Vaughan* has ſuſtained by reaſon of the ſaid diſſeiſin, and that he ſend the inquiſition which, &c. to our lord the king on the morrow of the aſcenſion wherefoever, &c. under the ſeal and ſeals, &c. together with the writ of our ſaid lord the king to him thereof directed; the ſame day is given to the ſaid *William Vaughan*, &c. At which day before our ſaid lord the king at

Judgment below affirmed.

Writ of inquiry awarded.

(*b*) Damages and coſts were given in a writ of entry *ſur* diſſeiſin by the ſtatute of *Gloceſter*, 6 *Edw.* 1. c. 1. 2 Inſt. 286.

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Return.

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Weſtminſter, comes the ſaid *William Vaughan*, by his ſaid attorney, and the ſheriff, to wit, *John Vaughan*, eſq. returns a certain inquiſition indented, taken before him at *Tallylyn*, in the ſaid county of *Merioneth*, on the 7th day of *May*, in the 22d year of the reign of our ſaid lord the now king, by the oath of 12, &c. by which it appears, that the ſaid *William Vaughan* has ſuſtained damages by reaſon of the ſaid diſſeiſin, to 190*l.* 3*s.* and 4*d.* Therefore it is (2) conſidered that the ſaid *William Vaughan* do recover, againſt the ſaid *Eleazor Careſwell* and *Lodwick Owen*, his damages aforeſaid, by the inquiſition aforeſaid, in form aforeſaid, found; and it is further conſidered, that the ſaid *William Vaughan* do recover againſt the ſaid *Eleazor Careſwell* and *Lodwick Owen*, 6*l.* 13*s.* and 4*d.* adjudged to the ſaid *William Vaughan* by the court of our ſaid lord the king here with his aſſent, according to the form of the ſtatute thereof lately made and provided, for his charges, coſts, and damages, which he has ſuſtained by reaſon of the delay of the ſaid judgment, on pretence of the proſecution of the ſaid writ of our ſaid lord the king of error; and that he the ſaid *William Vaughan* have execution thereof, and of the damages aforeſaid, by the ſaid inquiſition in form aforeſaid found, &c.

Judgment for the damages found the jury,

and coſts.

(2) We have ſeen, that if a record be removed into the court of K. B. it always remains there, (*ante* 27) and as execution is founded upon the record, it muſt iſſue out of the court where the record is; and therefore when the judgment is affirmed in the K. B. on a writ of error from the common pleas, courts of great ſeſſions in *Wales*, or other inferior court, execution iſſues immediately out of that court. Bro. Error. 82. *Cowp.* 843. *Vicars* v. *Haylon*, 3 Term Rep. 657. *Cowperthwaite* v. *Owen*.

Careſwell and another againſt Vaughan.

Caſe 3.

ERROR brought by *Careſwell* and *Owen* againſt *Vaughan*, to reverſe a judgment given, in the great ſeſſions of *Merionethſhire*, in *Wales*, in which *Vaughan* was demandant, againſt *Careſwell* and *Owen*, by a writ of *quod ei deforceat*, on the ſtatute of *Ruthland* of 12 *Edw.* 1. which is not in print, (3) (ſee Cro. Car. 445,) and made proteſtation to proſecute it in the nature of a writ of entry in the *quibus*, (4) in nature of an aſſize

S. C. 1 Mod. 7, 2 Keb. 553. 563. 574. 603. Miſtakes of *reddat* and *meſſuagium* inſtead of *reddant* and *meſuagium*, and a ſuperfluous *&c.* in a writ of *quod ei deforceat*, are

(3) It is now printed in the appendix to *Ruffhead*'s edition of the ſtatutes; the title of the writ is, "Breve commune, quod in aliquo caſu tangit *jus*, et in aliquo *poſſeſſionem*;" and the form of it is, "*Rex vicecomiti ſalutem;* Precipe A. quod juſte et ſine dilatione reddat B. manerium de N cum pertin. quod predictus A. ei deforceat, ut dicit, et niſi fecerit, et predictus B. fecerit te ſecurum de clameo ſuo proſequendo, tunc ſummoneas per bonos ſummonitores predictum A. quod ſit coram juſticiario noſtro, oſtenſurus quare non fecerit. Et habeas ibi ſum. et hoc breve. Dat. &c." or thus, "Precipe A. quod juſte, &c. reddat B tantum terræ cum pertin. in N. ut ſupra." It was ſaid by *Needham*, who had been juſtice of *Cheſter*, that a *quod ei deforceat* is uſual in *Wales*, and the demandant may count *in the nature of what action he will* in a plea of land by cuſtom there. Bro. *Quod ei deforceat*, 9. cites 2 *Edw.* 4. 11. It is therefore held to be in the nature of *a writ of right* for tenant in fee ſimple. 5 Rep. 85. b. *Penryn*'s caſe, Cro. Car. 179. *Gryffyth* v. *Jenkins*, Or of a *formedon* for tenant in tail. Ibid. 444. *Gryffyth* v. *Lewis*, or it may be brought by tenant for life, ante 30. tenant by the curteſy or in dower; for the ſtatute of *Ruthland* appoints a general writ, and directs the demandant to make his proteſtation to ſue in the *nature of what writ he pleaſes*, and extends as well to real actions at common law *before* the 12 *Edw.* 1. as to ſuch as are given by ſtatutes ſince. Cro. Car. 445. *Gryffyth* v. *Lewis*, S. C. *Sir W. Jones*, 380, 381. Plow. 126. b. *Buckley* v. *Thomas*. And therefore a *quod ei deforceat* given by the ſtatute of *Weſtminſter* 2. (13 *Edw.* 1.) c. 4. to tenant in dower, tenant in frank marriage, for life, or in tail, who loſe their lands by default, is within it. Ibid. So a common recovery may be ſuffered of lands in *Wales* upon this writ of *quod ei deforceat*. 1 Lev. 130. *Winne* v. *Lloyd*.

(4) If the writ of entry be upon a diſſeiſin by the tenant himſelf to the demandant or his anceſtors, it is in the nature of an aſſize, and is called a writ of entry *in the quibus*. F. N. B. 442. 7th edit. If it be upon a diſſeiſin by any perſon under whom the tenant claims, it is a writ of entry in the *per*. Ibid. D. If upon a diſſeiſin by B. to whom A. owes title, by whom the tenant claims, it is in the *per and cui*. Ibid. If upon a diſſeiſin beyond theſe degrees, it is a writ of entry in the *poſt*. Ibid. See Booth. 172, 173. and 3 Black. Comm. 180, 181, 182.

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amendable by the ſtatutes of 8 H. 6. c. 12. and 15. the proviſo in the laſt ſtatute, that it ſhall not extend into Wales, being annulled by 27 H. 8. c. 26. It is a *quod ei deforceat* in Wales in which the tenant ought not to vouch, he never theleſs vouches, and demurs to a counter-plea to the voucher, and the demurrer is adjourned to another great ſeſſions, it is peremptory on the tenant, though the voucher was illegal

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aſſize of *novel diſſeiſin* at the common law, and counted accordingly: the tenants pray judgment of the writ, becauſe in the writ it was *he* render, whereas it ſhould be *they* render, in the plural number; and becauſe there was the word *meſſuage*, whereas it ſhould be *meſuage*; and further, becauſe there was a ſuperfluous *&c.* in the writ; upon which there was a demurrer; and after ſeveral continuances, the writ was adjudged good, and a *reſpondeas ouſter* awarded: and then the tenants vouch one *Snell*, of the county of *Cornwall*, "who has no lands or tenements in the county of *Merioneth*, but only in the county of *Cornwall*, ſummoned in the county of *Cornwall* by aid of the court of our lord the king, &c." and after ſome continuances, the demandant ſaid that the tenants "ought not to be admitted to ſuch vouching of the ſaid *John Snell* to warranty (5), becauſe he ſays that the ſaid *John Snell* is not named in the ſaid writ, wherefore he prays judgment if the ſaid (tenants) ought to be admitted to ſuch voucher to warranty, &c." upon which plea the tenants demurred in law: and after ſeveral continuances the court below gave a peremptory judgment againſt the tenants, viz. that the demandant recover ſeiſin of the land, and the tenants ſhould be in mercy; and a writ of *habere facias ſeiſinam*, and a writ of inquiry

(5) A warranty is defined by Lord *Coke* to be a covenant real annexed to lands, whereby a man and his heirs are bound to warrant the ſame, and either upon voucher, or by judgment in a writ of *warrantia cartæ*, to yield other lands to the value of thoſe that ſhall be evicted by a former title: Co. Litt. 365. a. Warranty is either expreſs or implied. An *expreſs* warranty can only be made by the word *warrantizo*. Lill. ſect. 733. Co. Litt. 384. a. but an *implied* one may be created by other words; as *dedi* is a warranty to the feoffee and his heirs during the life of the feoffor; though *conceſſi* is not, either in a feoffment or fine, Co. Litt. 384. a. So in an exchange the word *excambium* imports a mutual warranty. Ibid. And in partition, it is implied that the one warrants the other. So where there is a gift in tail, or a leaſe for life of land, reſerving rent, the donor or leſſor is bound to warranty. Co. Litt. 384. b. So when dower is aſſigned, a warranty is implied. Ibid. *An expreſs* warranty does not bind the heirs, unleſs they be *named*, as, *ego et heredes mei warrantizabimus*. Co. Litt. 383. b. 384. b. F. N. B. 312. H. 7. edit. but an *implied* warranty does. Co. Litt. 384. b. If a father and his heir apparent join in a feoffment with warranty, and the father die, the heir is doubly bound, by his own warranty, and

inquiry of damages for the meſne profits was alſo awarded. And thereupon the tenants (the now plaintiffs) brought a writ of error in this court, which was argued ſeveral times by *Williams* and *Saunders*, for the plaintiffs in error; and they contended that the original writ was bad for the exceptions above mentioned, and cited ſome caſes where original writs had been abated for ſimilar faults, as 18 Edw. 2. Fitz. Aſſize 375. where a writ was *debet* and *ſolet* inſtead of *debent* and *ſolent*, and abated for that cauſe, which is the ſame caſe with the preſent, for here it is *reddat* inſtead of *reddant*; and in 27 H. 6. 2. 6. pl. 37 (*b*) a writ of aſſize was abated for the omiſſion of the word *tunc*; ſo 9 H. 7. (*c*) 16. *habeas ibi hac breve* inſtead of *hoc breve* made the writ vitious, and it could not be amended: and they alſo urged that the ſtatute 8 H. 6. c. 15. for amending defects in records, &c. has an expreſs *proviſo* that it ſhall not extend to any proceſs in *Wales*, ſo that it remains at common law; wherefore the juſtices in the great ſeſſions had erred in awarding a *reſpondeas ouſter*, for they ought to have abated the writ; but this objection was diſallowed, for by the court it is amendable by the ſtatute 8 H. 6. c. 12. by which it is enacted, "That for errors aſſigned or to be aſſigned in any record, proceſs or warrant of attorney, original writ or judicial, panel or retorn in any places of the ſame razed or interlined, or in any addition, ſubtraction or diminution of words, letters, titles, or parcel of letters, found in any ſuch record, proceſs, warrant of attorney, writ, panel or retorn, which razings, interlinings, addition,

(*b*) Fitz. Brief 105. Bro. Brief 22.

(*c*) Bro. faux Latin 78. Ibid. Amendment 62. Ibid. Obligation 71.

and as heir to his father. Moor, 20. pl. 68. And if two join in a warranty, and one dies, the heir and ſurvivor may be vouched, or the ſurvivor alone, at the election of him who has the warranty. Ibid. But where two are *jointly* bound in an *obligation*, and one dies, the whole charge falls upon the ſurvivor. Ibid. So with reſpect to the perſon *to* whom a warranty is made, it is held, that unleſs it be to another and his *heirs*, or in words which relate to heirs, as where lands are given to A. and his heirs, and the warranty is to him in *formâ predictâ*, it extends only for life. Co. Lit. 47. a. 384. b. 385. b. If a man warrant to B. his *heirs and aſſigns*, it extends to all aſſigns and their aſſigns *toties quoties* for ever. Co. Lit. 384. b. So a warranty extends to an aſſignee of *part*; as where there is a feoffment in fee of two acres, with warranty to the feoffee, his heirs and aſſigns, if he make a feoffment in fee of one acre, the feoffee ſhall vouch as aſſignee. Co. Lit. 385. a.

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addition, ſubtraction or diminution at the diſcretions of the judges of the courts and places, in which the ſaid records or proceſs by writ of error or otherwiſe, be certified, do appear to be ſuſpected, no judgment or record ſhall be reverſed or annulled. And that the king's judges of the courts and places in which any record, proceſs, word, plea, warrant of attorney, writ, panel or retorn, which for the time ſhall be, ſhall have power to examine ſuch records, proceſs, words, pleas, warrants of attorney, writs, panels or retorn, by them and their clerks, and to reform and amend (in affirmance of the judgments of ſuch records and proceſſes) all that which to them in their diſcretion ſeems to be miſpriſion of the clerks in ſuch records, proceſſes, word, plea, warrant of attorney, writ, panel and retorn, (except appeals, &c.) ſo that by miſpriſion of the clerk, no judgment ſhall be reverſed or annulled." And though it was urged that this matter was not amendable in the great ſeſſions, and the party there might take advantage of it by a plea in abatement; and that this court ought to give the ſame judgment as the great ſeſſions ſhould have given, which ought to be that the writ ſhould abate, yet the court over-ruled the objection as already mentioned. Yet *quære* of this, for the court did not pay much regard to it; and the court further ſaid, that now the ſtatute of 8 H. 6. c. 15. was in force in *Wales*, by the ſtatute 27 H. 8. c. 26. ſ. 2. by which it is enacted, "that the laws, ordinances, and ſtatutes of this realm of *England* for ever, and no other laws, ordinances, nor ſtatutes, from and after the feaſt of *All Saints* next coming, ſhall be had, uſed, practiſed, and executed in the ſaid country or dominion of *Wales*, and every part thereof, in like manner, form, and order as they be or ſhall be had, uſed, practiſed, and executed in this realm," by which ſtatute the court thought that now the ſaid *proviſo* in the ſtatute of 8 H. 6. c. 15. was annulled, and that original writs may now be amended in *Wales* as well as in *England*, by force of the ſtatute of 8 H. 6. c. 15.: and this ſeems to me the better reaſon (*d*); but the court did not pay much regard to any of the ſaid matters, but over-ruled the exception as aforeſaid. Then it was argued, that the court of great ſeſſions ought not to have given a peremptory judgment on the demurrer to the counterplea

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(*d*) 5 Rep. 49. b. Vaughan's caſe, 2 Bulſt. 54. Hall v. Rotherom. Plow. 126. b. Buckley Thomas.

counterplea of voucher; and this depends on the ſtatute of *Weſtminſter* 1. c. 40. which prohibits vouchers out of the lien (6) and gives a counterplea of voucher; and if it be adjourned over to another day, it is peremptory againſt the tenant, if the counterplea be adjudged againſt him; but here, they ſaid, was no voucher at all, for in an aſſize of *novel diſſeiſin*, or in a writ of entry in the *quibus*, which is in nature of an aſſize of *novel diſſeiſin*, no voucher lies. F. N. B. *Warrantia Chartæ* 134. 33 H. 6. 23. a. Bro. Voucher, 121. (*e*). And the reaſon is becauſe the tenant is ſuppoſed to be in of his own wrong; and therefore the tenant is not ſuffered to be put in ſuch frivolous voucher; but if he do, it ought not to be peremptory any more than where a defendant delays the plaintiff by one or two general imparlances, or pleads a dilatory plea in abatement which is over-ruled, and a *reſpondeas ouſter* awarded, and then puts in another dilatory plea in abatement, which ought not to be received by the court, for only one dilatory plea is allowable; yet if the court receive it, and there be a demurrer to it, and the plea awarded bad, it is not peremptory on the defendant; neither is it in this caſe. And it was further argued, that here there was no counterplea of voucher; for a counterplea of voucher ſhould contain ſome matter of fact, in order to ouſt the voucher, but in this caſe nothing was ſaid but that *Snell* is not named in the writ, which appears judicially to the court, without the ſhewing of the party; and therefore there was no counterplea of voucher, and the demurrer to it was not peremptory on the tenants. But if it had been a good counterplea, yet, it ſeems it is not peremptory, though it be adjourned to another term, as appears from the books of 40 Aſſize. pl. 2. (*b*) 11 H. 4. 23. (*c*) 26 H. 6. 40. (*d*) 8 H. 7. 7. 10 H. 7. 22. and therefore it was prayed that the judgment ſhould be reverſed. *Sed non allocatur*; for the ſtatute was made to prevent delay, and there has been as great a delay by this illegal voucher,

(*e*) Ante 32. note 1.

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(*b*) Bro. Peremptorie, 60.
(*c*) Ibid. 10.
(*d*) Ibid. 42. This ſeems an authority to the contrary of what it is cited to prove.

(6) *Lien* is properly the binding of the vouchee by force of the warranty; for the vouchee ſays, "*Que aves vous a lier* a garranty?" the tenant then ſhews the *lien*, that is, the deed or fine, &c. which binds the vouchee to warranty. See 2 Inſt. 243.

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voucher, as could have been if the voucher had been legal. And if this voucher had been within the lien, yet it ought not to be foreign, namely, in a county in *England* becauſe it could not be tried; for the ſtatute 34 and 35 H. 8. c. 26. has provided for the trial of a foreign voucher in any county *in Wales*, but if a foreign voucher be in any county *in England*, the juſtices may proceed notwithſtanding ſuch foreign voucher. And though the voucher be not counterpleaded but demurred to, it is ſtill peremptory upon the tenant if it be adjourned, as it is here, for it is within the ſame miſchief; and ſo is 2 Inſt. 243. expreſsly; wherefore a rule was given for affirmance of the judgment unleſs cauſe in this term.

And now in this term, *Turner* ſerjeant, of *Gray's Inn*, took another exception, that it appears by the record that the court of great ſeſſions begun on a *Wedneſday*, whereas it is appointed by the ſtatute 34 and 35 H. 8. c. 26. "that each of the ſaid ſeſſions ſhall be kept and continued by the ſpace of ſix days in every of the ſaid ſhire at either of the ſaid times as hath been uſed within the ſaid three ſhires of *North Wales*." And he ſaid in *North Wales* the ſeſſions always begun on a *Monday*, and continued for ſix days together without intermiſſion: but here if the ſeſſions begin on a *Wedneſday*, a *Sunday* will intervene, which is not according to the cuſtom of *North Wales*, and conſequently not according to the ſtatute. *Sed non allocatur*; [42] for it does not appear that the ſeſſions begun on a *Wedneſday*, but the plea was adjourned until *Wedneſday* in the next great ſeſſions, ſo that the ſeſſions might have begun on a *Monday*, and the plea adjourned to *Wedneſday* in the ſame ſeſſions, for every day of the ſeſſions is as a ſeveral return; and the plea may well be continued to every day of the ſeſſions. And *Kelynge* chief juſtice, and the court, thought that it would have been well enough if the ſeſſions had begun on a *Wedneſday*, for the intervention of *Sunday* does not diſcontinue the ſeſſions, but they may be adjourned to *Monday*, becauſe *Sunday* is *dies non juridicus*. And the ſeſſions may be well kept and continued by the ſpace of ſix days, notwithſtanding the intervention of *Sunday*; for the ſtatute does not appoint that they ſhall be kept and continued for ſix days together, or next and immediately following, but only for ſix days, which

Every day of the great ſeſſions is as a ſeveral return.

The great ſeſſions may be adjourned to Monday if a Sunday intervenes, and need not be continued for ſix days together by the ſtatute 34 and 35 H. 8. c. 26. ſ. 14.

which muſt be the length of the ſeſſions, but it is not neceſſary to be all together without the interpoſition of *Sunday* or other feaſt. And the judgment was affirmed (7).

(7) This perhaps may not be an improper place to take ſome notice of common recoveries; for though they are fictitious proceedings and amicable actions, yet it is neceſſary the *actores fabulæ*, as they are ſometimes termed, ſhould be the ſame as in adverſary ſuits; there muſt, for inſtance, be a demandant, a tenant, and a vouchee; and the writ muſt be brought againſt ſuch perſon only as would be an unexceptionable tenant in an adverſary action. Pigott 28.

A common recovery is with great correctneſs defined to be "a conveyance on record, invented to give a tenant in tail an abſolute power to diſpoſe of his eſtate, as if he were tenant in fee ſimple." Willes's Rep. 451. *Martin* v. *Strachan*. Being *a judgment* in a real action, it cannot of courſe be commenced without an original; if however it be ſuffered without, it is not *void*, but only *voidable* by error. 3 Rep. 3. a. *Marquis of Winchester*'s caſe, The writ ſued out upon this occaſion is a writ of entry *ſur diſſeiſin in the poſt*, which is often called a *præcipe*, and the defendant the tenant to the *præcipe*. Pigott, 28. It is abſolutely neceſſary that the tenant to the *præcipe* ſhould have an eſtate of *freehold* by right or by wrong in the lands to be recovered; therefore where the limitation in a ſettlement was to the uſe of R. D. for and during the term *of* 99 *years*, if he ſhould ſo long live; and from and after his death, or other ſooner determination of the term, to the uſe of truſtees and their heirs during the life of R. D. to ſupport contingent remainders; remainder to the uſe of the firſt ſon and iſſue male of the body of R. D. lawfully begotten, and to the heirs male of the body of ſuch firſt ſon lawfully iſſuing; and for default of ſuch iſſue to the uſe of all and every other ſon and ſons of R. D. ſeverally and ſucceſſively in tail male, with divers remainders over; R. D. together with his only ſon F. D. levied a fine, and ſuffered a recovery to the uſe of R. D. in fee. *Willes* C. J. of the C. P. delivered the unanimous opinion of all the judges in the houſe of lords, that the freehold veſted immediately in the truſtees during the life of R. D. as a veſted, and not a contingent, remainder, and was in them at the time of levying the fine; and therefore as the fine did not convey to the conuſee an eſtate of freehold, and make him a good tenant to the *præcipe*, the recovery was void. Willes's Rep. 327. *Parkhurſt* v. *Smith*, leſſee of *Dormer*. It was never neceſſary that the tenant ſhould have the freehold at the time of ſuing out, or even the return, of the writ of entry; if he acquired the freehold at any time *before judgment* it was ſufficient. Thus where the tenant appeared on the return of the writ of entry, and vouched the tenant in tail, and *a ſummoneas ad warrantizandum* iſſued, before the return whereof tenant in tail conveyed to the tenant by leaſe and releaſe for life; and then appeared at the return of the writ of ſummons, and vouched over the common vouchee, it was aſſigned for error that the tenant was not ſeiſed of the freehold *at the return of the writ of entry*, but the recovery was held good; for *per Holt* C. J. if the tenant to the *præcipe* acquires the freehold *before judgment*,

ment, it is ſufficient, for it cannot be ſaid to be a recovery againſt him *that had nothing*. 2 Salk. 568. *Lacey* v. *Williams*. S. C. Carth. 472. 1 Ld Raym. 227. 475. *Holt*, Rep. 614. Comb. 423. S. P. 1 Show. 347. *Samborne* v. *Belke*. And this is carried ſtill further by ſtatute 14 Geo. 2. c. 20. ſ. 6. which enacts, "that every recovery ſhall be deemed good and valid to all intents and purpoſes, notwithſtanding the fine, or deed or deeds, making the tenant to the writ, ſhould be levied or executed *after the time of the judgment given in ſuch recovery, and the award of the writ of ſeiſin*, provided the ſame appear to be levied or executed *before the end* of the term, great ſeſſion, ſeſſion or aſſizes, in which ſuch recovery was ſuffered, and the perſons joining in ſuch recovery had a ſufficient eſtate and power to ſuffer the ſame." It has been held that, though the deeds to make a tenant to the *præcipe* be not executed *till after the execution of the writ of ſeiſin*, ſtill the recovery will be good by this ſtatute, if the deeds be executed in the term in which the recovery is ſuffered. 2 H. Black. Rep. 46. *Goodright* v. *Rigby*, afterwards affirmed in error in the king's bench. 5 Term Rep. 177. At the common law the writ would only lie againſt him who was actual tenant in poſſeſſion of the freehold; 2 Leon. 58. *Ard*'s and *Smith*'s caſe; therefore where lands were let out on leaſes for lives, tenant in tail could not ſuffer a recovery unleſs he procured conditional ſurrenders from the leſſees for lives, or they joined him in making the tenant to the *præcipe*: nor can he at this day, where there is an eſtate for life limited prior to his eſtate tail, unleſs he procure a conditional ſurrender from the tenant for life, or join with him in conveying an eſtate to the tenant to the *præcipe*. Pigott, 41. But now with reſpect to lands let out on leaſes for lives, the ſtatute 14 Geo. 2. c. 20. ſ. 1. reciting that ſeveral leaſes had been theretofore, and were thereafter likely to be made of honors, caſtles, manors, lands, tenements, and hereditaments for one or more life or lives under particular rents thereby reſerved, and to be reſerved; and that procuring ſurrenders of ſuch freehold leaſes, or the tenants thereof to join, in order to make tenants to the writs of entry or other writs for ſuffering common recoveries, frequently occaſioned great trouble, difficulty and expence to tenants in tail, and the ſame could not in many caſes be obtained by reaſon of the uncertainty in whom the legal eſtate of freehold under ſuch leaſes was veſted, and alſo by reaſon of the diſabilities and incapacities of ſuch leſſees, or perſons claiming under them; by means whereof purchaſes and family ſettlements were often delayed, and might be in great danger of being defeated, enacts, "that all common recoveries ſuffered, or to be ſuffered in his majeſty's court of common pleas at *Weſtminſter*, or in any other court of record in the principality of *Wales*; or in any of the counties palatine, or in any other court having juriſdiction of the ſame, of any honors, &c. without any ſurrender or ſurrenders of ſuch leaſe or leaſes, or without the concurrence, or any conveyance or aſſurance from ſuch leſſee or leſſees, or other perſon or perſons claiming under ſuch leſſee or leſſees, in order to make good tenants to the writs of entry, or other writs, whereupon ſuch recoveries have been or ſhall be had or ſuffered, ſhall be as valid and effectual in law to all intents and purpoſes whatſoever, as if ſuch leſſee or leſſees, or any other perſon or perſons

perſons claiming under him, her, or them, had conveyed or joined in conveying, or ſhall convey or join in conveying, a good eſtate of freehold to ſuch perſon or perſons, as has or have been, or ſhall become, tenant or tenants to ſuch writs of entry, or other writs whereupon ſuch common recoveries have been or ſhall be ſuffered." This is a declaratory law, and ſeems to have reſtored the original tenant to the *præcipe*; for, before the ſtatute of *quia emptores terrarum* (18 Edw. 1. c. 1.) ſubinfeudations, upon which rents and ſervices were reſerved, did not prevent a writ of entry from lying againſt the freeholder of the ſeignory; and therefore when common leaſes for one or more life, or lives reſerving rent came in uſe, they reſembled ſubinfeudations, and ought not to have prevented the *præcipe* from being brought againſt the owner of the freehold under which the leaſes were granted. 1 Burr. 115. *Taylor* v. *Horde*. But with reſpect to prior eſtates for life they are expreſsly excepted in the ſtatute 13 Geo. 2. c. 20. ſ. 2. by which it is provided, "That nothing in this act contained ſhall extend, or be conſtrued to extend, to make any common recoveries valid and effectual in law, unleſs the perſon or perſons entitled to the firſt eſtate for life, or other greater eſtate (in caſe there be no ſuch eſtate for life in being) in reverſion, or remainder next after the expiration of ſuch leaſes, has or have, by ſome lawful act or means, conveyed or aſſured, or joined in conveying or aſſuring, or ſhall by ſome lawful act or means convey or aſſure, or join in conveying or aſſuring, an eſtate for life at the leaſt, to ſuch perſon or perſons as has or have been, or ſhall become, tenant or tenants to the writs of entry, or other writs, whereupon ſuch common recoveries have been or ſhall be ſuffered." The ſurrender of the prior eſtate for life muſt be made to him who has ſuch immediate remainder or reverſion in tail *before* he makes a tenant to the *præcipe*; for if it be *after*, it will be void, inaſmuch as there will then be no remainder or reverſion for the ſurrender to operate upon; therefore in that caſe it ought to be made to the tenant to the *præcipe*. Pigott 50.

But ſometimes it will be *preſumed* that the tenant for life ſurrendered his eſtate, though there be no proof of it; as where *poſſeſſion* has accompanied a recovery for a long time. Thus in an ejectment upon a trial at bar for lands in ancient demeſne, a recovery in the court of ancient demeſne was produced, which had been ſuffered a long time before, and poſſeſſion had gone accordingly; but it appeared that part of the land was leaſed for life, and the recovery was ſuffered by him in the reverſion, with a ſingle voucher, ſo that there was no tenant to the *præcipe*. However the court ſaid, that as poſſeſſion had gone along with the recovery for ſo long a time, they would *preſume* a ſurrender; 1 Vent. 257. Anon. S. C. 1 Mod 117. by the name of *Green* v. *Proude*, and 3 Keb. 310. *Green* v. *Froud*. So where collateral evidence has been given of a ſurrender by tenant for life, the recovery has been adjudged good. As where on a trial at bar, the leſſor of the plaintiff claimed under an intail in a family ſettlement, by which part of the eſtate appeared to be in jointure at the time of the recovery, and it was inſiſted, that there was no tenant to the *præcipe* for that part; but it was anſwered by the defendant that after 40 years had elapſed, a ſurrender ſhould be preſumed according to 1 Vent. 257.; and to fortify this preſumption they

they offered in evidence the debt-book of an attorney then dead, who had, among other expences of ſuffering the recovery, charged for drawing a ſurrender of the jointure eſtate, and for engroſſing two parts of it, which the court received, for it was a material circumſtance in the inquiry into the reaſonableneſs of preſuming a ſurrender, and not to be ſuſpected to be done for that purpoſe; and the court declared, "that without that circumſtance they would have preſumed a ſurrender," and deſired it might be taken notice of, "that they did not require any evidence to fortify the preſumption, after ſuch a length of time." 2 Str. 1129. *Warren* v. *Grenville*. But where there is no ground for ſuch preſumption, and poſſeſſion has not gone with the recovery, the court will not preſume a ſurrender. As where a jointreſs, tenant for life of part of the eſtate, was in poſſeſſion thereof at the time of the recovery, and continued in poſſeſſion until her death, when an ejectment was brought by the perſon in remainder for that part which was in her poſſeſſion, the court held, that as poſſeſſion had not gone with the recovery, but continued in the tenant for life until the ejectment, they could not preſume a ſurrender, and the recovery was void as to that part, and thought that the propoſition in *Strange* was too general. 2 Burr. 1065. *Goodtitle* v. *Duke of Chandos*. Indeed, where a perſon has a power to ſuffer a recovery, *omnia preſumuntur rite et ſolemniter acta*, until the contrary appears, Cro. Jac. 455. *Griffin* v. *Stanhope*, 2 Lutw. 1549. *Leigh* v. *Leigh*: but if the contrary appear, there is an end of ſuch preſumption. As where on a trial at bar in K. B. in *Eaſter* term 1747, the validity of two common recoveries, in 1714 & 1721, came in queſtion, it was ruled by the court, that though at ſuch a diſtance of time proper tenants to the *præcipe* ſhould be preſumed, *where no deed appears*; yet it appearing in the principal caſe, that there were deeds inrolled for that purpoſe, wherein proper parties did not join, ſo that it was manifeſt there were *no* good tenants to the *præcipe*, the court could not preſume there *were* good tenants; and therefore directed the jury to find againſt the recoverers; which they did accordingly. 2 Str. 1267. *Keen* v. *Earl of Effingham*.

It is held that a huſband ſeiſed of an eſtate tail in poſſeſſion in right of his wife, may make a good tenant to the *præcipe* by deed only, without the wife's joining him in a fine. Pigott, 71, 72. Cruiſe, 52—55. 2d edit. Harg. and But. Co. Litt. 326. b. in the note.—The tenant to the *præcipe* may be made either by fine, feoffment, leaſe, and releaſe, covenant to ſtand ſeiſed, ſurrender, or bargain and ſale enrolled; if he be made by the latter, it is held that he may appear and count before the enrolment of the bargain and ſale, provided it be enrolled within ſix months as preſcribed by the ſtatute; for though the freehold does not paſs until enrolment, yet when that is done, the freehold is conſidered as having paſſed from the bargainor at the time when the bargain and ſale was executed by relation. Caſ. Temp. Talb. 164. *Robinſon* v. *Comyns*, Pigot, 56, 57.

It appears by what has been ſaid, that the validity of common recoveries, has frequently been called in queſtion on account of irregularities in making a tenant to a *præcipe*; therefore to obviate this inconvenience, the ſtatute 14 Geo. 2. c. 20. ſ. 5. already referred to, was made; which, reciting that it

had frequently happened that the deeds for making the tenants to the writs of entry, or other writs, for ſuffering common recoveries, had been loſt, or that the fines or deeds making the tenants to the ſaid writs had not been levied or executed till after the judgment given in ſuch recoveries, and the writ of ſeiſin awarded; by reaſon whereof great doubts had ariſen, whether ſuch recoveries for want of proper tenants to the writs, were good and effectual in law; to prevent ſuch doubts for the future, and in order to render common recoveries more certain and effectual, enacts, "That every common recovery already ſuffered, or hereafter to be ſuffered, ſhall, after the expiration of 20 years from the time of the ſuffering thereof, be deemed good and valid to all intents and purpoſes, if it appear upon the face of ſuch recovery that there was a tenant to the writ, and if the perſons joining in ſuch recovery had a ſufficient eſtate and power to ſuffer the ſame, notwithſtanding the deed or deeds for making the tenant to ſuch writ ſhould be loſt or not appear." But no prior term *for years* will prevent him that has the remainder in tail from ſuffering a common recovery. Pigot, 50, 51. and by the ſtatute 21 Hen. 8. c. 15. it is enacted, that no term for years, nor eſtate held by ſtatute merchant, ſtaple, or *elegit*, ſhall be barred by a common recovery. Co. Lit. 46. a.

Having thus ſhewn who is a good tenant to the *præcipe*, it ſeems neceſſary to premiſe that a recovery may be ſuffered with a ſingle, double, or treble voucher; a recovery with a ſingle voucher is where the *præcipe* is brought againſt the tenant in tail himſelf, who vouches over the common vouchee. This is a good bar to the eſtate tail which the tenant in tail is actually ſeiſed of at the time of the recovery; but if he be diſſeiſed of the eſtate tail, or diſcontinue it by fine or feoffment, and take back an eſtate to himſelf in fee, or in tail, and ſuffer a recovery with ſingle voucher, it will not bar the eſtate tail for the reaſon above aſſigned; and the iſſue may avoid it by the plea, that his anceſtor "*nient tenant tempore brevis, nec unquam poſtea.*" Pigot, 109—117. A recovery with double voucher is where tenant in tail conveys an eſtate of freehold to an indifferent perſon againſt whom the *præcipe* is brought, who vouches the tenant in tail, who vouches over the common vouchee. It is now uſual to have a recovery with double vouchee at leaſt, being in all caſes the moſt ſafe, as it bars not only the eſtate whereof tenant in tail is then in poſſeſſion, but alſo every other eſtate which he has any right to, or is intereſted in, though it be deveſted out of him, or diſcontinued and turned to a right. Pigot, 109. Bro. Recovery in value 19—30. A recovery with treble voucher is uſed to make a perpetual bar to the eſtate which the tenant to the *præcipe* was ſeiſed of, and alſo of every eſtate of inheritance which has ever been in the firſt or ſecond vouchee or their anceſtors, and alſo of all remainders and reverſions depending on thoſe eſtates, and all charges and incumbrances derived out of thoſe remainders and reverſions. That which is intended to be ſpoken of in this note is a recovery with a double voucher.

The tenant and vouchee either appear in perſon or by attorney; the tenant almoſt always appears in perſon, for as his appearance by attorney would be attended with an additional expence, care is generally taken to make either the

the ſolicitor employed to ſuffer the recovery, or ſomebody who will appear perſonally in court, tenant to the *præcipe*; the vouchee too very often appears in court in perſon. Let us then firſt ſuppoſe that both the tenant and vouchee appear perſonally; the firſt ſtep regularly is to apply to the cuſtitor of the county where the lands lie, for a writ of entry, giving him proper inſtructions as to the quantity and quality of the lands, where ſituate, and the names of the parties, and thereupon he makes out a writ, the form of which may be ſeen poſtea, 86. 2 Black. Com. Appendix, 17. There muſt be 15 days at leaſt between the teſte and the return of the writ—The next ſtep is to draw on paper *a præcipe* in this form, "*Berkſhire*, to wit, Command *William Jackſon*, gent. that juſtly &c. he render to *Thomas White*, gent. 4 meſſuages, &c. (as in the writ of entry down to "*which he claims, &c.*") At the foot of the *præcipe* are added theſe words, "tenant in perſon vouches to warranty *Roger Blagrave*, eſq. who in perſon vouches *Thomas Francis Martin*;—this is uſually called a *præcipe* at bar. The *præcipe, with the writ of entry annexed to it*, is then taken down to the court of common pleas at *Weſtminſter*, on ſome day of the term in which the writ is returnable, when the tenant and vouchees (if more than one) appear at the bar before one of the ſerjeants, who examines ſuch of the vouchees as happen to be married women apart from their huſbands, to learn whether they freely diſpoſe of their intereſt in the premiſes or not, and ſubſcribes his name to the *præcipe*. For by a rule of the court of C. B. made in Trinity term 30 Geo. 3. it is ordered, "that from and after the firſt day of *Michaelmas* term next, in every common recovery, wherein the vouchee or vouchees ſhall perſonally appear at the bar of this court for the purpoſe of ſuffering ſuch recovery, the writ of entry ſhall be ſued out, and produced at the time of the recording of the vouchee or vouchees appearance at bar at the foot of the *præcipe* in ſuch recovery." Indeed when a peer of the realm ſuffers a recovery in perſon, ſome of the ſerjeants count in open court, reciting the pleading of each party as ſet forth in the entry of the recovery almoſt *verbatim*.—The next ſtep to be purſued is to have the writ of entry compounded at the alienation-office, in like manner as is done in a writ of covenant for a fine; the attorney general's hand muſt then be had to it, for which he receives an ancient fee of 10s. A writ of ſeiſin is then ſued out, the form of which may be ſeen in Wilſ. on Fines, 371. 3d ed. This writ ſhould bear *teſte* the 4th day inclufive after the return of the writ of entry; as where the writ of entry is returnable on the Morrow of All Soul's, the writ of ſeiſin muſt be teſted on the 6th of *November*. There muſt alſo be 15 days between the *teſte* and the return of the writ of ſeiſin. If the writ of entry be returnable ſo late in the term that the writ of ſeiſin cannot be returnable in that term, it is made returnable *forthwith*; as where the writ of entry is returnable on the Morrow of *St. Martin*, (the 12th of *November*,) or on the octave of *St. Martin*, (the 18th of *November*,) there are not 15 days between either of theſe returns and the laſt return of the term, which is 15 days of *St. Martin* (the 25th of *November*). But if the writ of entry be returnable on the laſt day of a term, the writ of ſeiſin muſt be returnable the firſt return of the next term; unleſs it be Trinity term, in which caſe it muſt be

on the 2d return, becauſe there are not 15 days between the laſt day of *Eaſter* term, and the morrow of the *Holy Trinity*. The writ of ſeiſin muſt be ſealed at the ſeal-office, and then, together with the writ of entry, is returned at the return office, which is in the prothonotary's office. The return on the writ of entry is in this manner. "Pledges of proſecution *John Doe* and *Richard Roe*. Summoners, *John Denn* and *Richaed Fenn*, Sir *L. P. Hart*, ſheriff."

The return of the writ of ſeiſin is thus indorſed, "By virtue of this writ to me directed on the 18th day of *November*, in the year within written, I cauſed full ſeiſin of the tenement, with the appurtenances and advowſon within ſpecified, to be delivered to the within named *T. W.* as I am within commanded. Sir *L. P.* bart. ſheriff."—The entry of the recovery is then drawn up, the form of which may be ſeen in Wilſ. on Fines, 330. 3d Edit." The recovery when drawn out, is entered on a plea roll, which may be had out of the prothonotary's office; it is then to be exemplified on parchment or vellum; the form of the exemplification, where the writ of ſeiſin is returned at the time of the teſte of the exemplification, may be ſeen in Wilſ. on Fines, 359. The recovery is generally exemplified the ſame term in which it is ſuffered, and teſted or dated the laſt day of the term, and after the return of the writ of ſeiſin, unleſs it be returnable in the next term, in which caſe the exemplification always bears teſte the laſt day of the term; and inſtead of entering the ſheriff's return of the writ of ſeiſin in the body of the exemplification, *the award* only of the writ of ſeiſin is entered. See Wilſ. on Fines, 369. Afterwards the writ of entry, and writ of ſeiſin, and the plea roll on which the whole proceedings are entered on record, as already mentioned, together with the exemplification, are taken unto the prothonotary's office, where the *præcipe*, and the teſte and return of the writ of entry are entered on the recovery remembrance roll. See the form, Wilſ. on Fines, 373.

There are however, many exemplifications of recoveries ſuffered between the commencement of the reign of queen Anne and that of Geo. 2. of which no entries upon the rolls in the treaſury of the common pleas are to be found, nor is there any writ of entry, ſummons, or ſeiſin filed with the *cuſtos brevium*. In order to prevent the inconvenience which might ariſe to purchaſers from an omiſſion of this kind, the ſtatute 14 Geo. 2. c. 20. ſ. 4. reciting, "that whereas by the default or neglect of perſons employed in ſuffering common recoveries, it has happened and may happen, that ſuch recoveries are not entered on record, whereby purchaſers for a valuable conſideration may be defeated of their juſt rights," enacts, "that where any perſon or perſons hath or have purchaſed, or ſhall purchaſe, for a valuable conſideration, any eſtate or eſtates in lands, tenements, or hereditaments, whereof a recovery or recoveries, is, are, or were neceſſary to be ſuffered in order to complete the title, ſuch perſon and perſons, and all claiming under him, her, or them, having been in poſſeſſion of the purchaſed eſtate or eſtates from the time of ſuch purchaſe, ſhall and may, after the end of 20 years from the time of ſuch purchaſe, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for ſuffering a common recovery, or common recoveries, and declaring the uſes of a recovery or recoveries

veries; and the deed or deeds ſo produced (the execution thereof being duly proved) ſhall in all courts of law and equity be deemed and taken as a good and ſufficient evidence for ſuch purchaſer or purchaſers, and thoſe claiming under him, her, or them, that ſuch recovery or recoveries was or were duly ſuffered and perfected according to the purport of ſuch deed or deeds, in caſe no record can be found of ſuch recovery or recoveries, or the ſame ſhould appear not to be regularly entered on record: provided always that the perſon or perſons, making ſuch deed or deeds as aforeſaid, and declaring the uſes of a common recovery or recoveries, had a ſufficient eſtate and power to make a tenant to ſuch writ or writs as aforeſaid, and to ſuffer ſuch common recovery or recoveries.

But it frequently happens that the vouchee cannot conveniently appear perſonally in court, in which caſe he makes a warrant of attorney to ſome other perſons to appear for him. The form of the warrant of attorney is this: "R. B. whom W. T. vouches to warranty, puts in his place L. M. and N. O. his attornies, jointly and ſeverally againſt T. W. to gain or loſe in a plea of land;" at the foot of which is added what is called the caption; thus, "taken and acknowledged on the 1ſt day of *November*, in the year of our Lord 1799, before us, A. B. C. D." The warrant of attorney muſt be acknowledged either before a judge, who muſt ſign it, or before commiſſioners appointed by writ of *dedimus poteſtatem de attornato faciendo*, who muſt certify the names of the perſons whom the vouchee appoints for his attornies, under their hands and ſeals in the manner above mentioned. The writ of *dedimus poteſtatem* is not founded on the ſtatute of *Carliſle*, for that only extends to perſons who acknowledge *fines*; but is provided by the *common law* to enable perſons, who cannot appear in court, to appoint attornies in their ſtead. When it is intended that the vouchee ſhall appear by attorney, the firſt ſtep in practice ſeems to be to ſue out a writ of *dedimus poteſtatem*, which is prepared by the curſitor of the county where the lands lie, on his receiving from the ſolicitor a *præcipe* for that purpoſe. The *præcipe* is in the form already given when we treated of the appearance of the vouchee in perſon, except that at the end of the *præcipe* are added theſe words, "*dedimus poteſtatem* for R. B. whom W. T. vouches to warranty, directed to Sir W. M. N. M. A. B. and C. D." Then the *præcipe*, (omitting of courſe the directions for a *dedimus*) warrant of attorney, and caption, are engroſſed upon the *ſame* parchment, which, together with the writ of *dedimus poteſtatem*, is delivered to the commiſſioners, before whom the vouchee acknowledges the warrant of attorney, and ſigns it; upon which they ſign the caption, and annex the parchment containing the *præcipe*, warrant of attorney, and caption, as has been already obſerved, to the writ or *dedimus poteſtatem*: indorſing on the back of the writ this return ſigned by them: "The execution of this commiſſion appears in a certain ſchedule to this commiſſion annexed." A. B. C. D. The form of the writ of *dedimus* is in Wilſ. on Fines. 383. By ſtatute 23 Eliz. c. 3. ſ. 5. it is enacted, that every perſon who ſhall take the knowledge of any warrant of attorney of any tenant or vouchee for ſuffering of any common recoveries, ſhall with the certificate of the warrant of attorney, certify

tify alſo the day and year whereon the ſame was acknowledged. And that no perſon who takes any ſuch knowledge of any warrant for any recovery, ſhall be bound to certify ſuch warrant, except it be within one year next after the ſaid knowledge taken; and that no clerk or officer ſhall receive any writ of entry, whereupon any common recovery is hereafter to paſs, unleſs the day of the knowledge of the warrant ſhall appear, in or by ſuch certificate. By a rule of the court of C. B. made in Hill. 14 Geo. 3. for the more effectual and certain proof of the due acknowledgments of warrants of attorney, taken from the tenants or vouchees in common recoveries by virtue of any writ of *dedimus poteſtatem*, it is ordered by the court, "that no common recovery, wherein the tenant or tenants, vouchee or vouchees, or any of them ſhall appear to defend by attorney, ſhall be arraigned at the bar, unleſs an affidavit or affidavits in writing on parchment ſhall be made and annexed to *a copy of* the *præcipe* and warrant or warrants of attorney acknowledged by ſuch tenant or tenants, vouchee or vouchees, by virtue of any writ or writs of *decimus poteſtatem*; in which affidavit or affidavits the perſon or perſons making the ſame ſhall ſwear that he or they knew the party or parties acknowledging ſuch warrant or warrants of attorney, that the ſame was or were duly ſigned and acknowledged upon the day and year, or ſeveral days or years mentioned in the caption or ſeveral captions thereof, that the party or parties acknowledging, and alſo the commiſſioners taking the ſame were all of full age and competent underſtanding, that the femes-covert (if any) were ſolely and ſeparately examined apart from their huſbands, and freely and voluntarily conſented to acknowledge the ſame, that all the ſaid parties knew the ſame warrant or warrants of attorney was or were intended for ſuffering a common recovery to paſs his, her, or their eſtate or eſtates, and further, that the razure or razures, interlineation or interlineations (if any), in the body or caption of ſuch original warrant or warrants of attorney was or were made, before the ſaid parties, or any of them, ſigned the ſaid warrant or warrants, and before the commiſſioners ſigned the ſaid caption or captions; which affidavit or affidavits (together with the ſaid copy of the *præcipe*, and warrant or warrants of attorney whereunto the ſame ſhall be annexed,) ſhall be filed in the office of inrolment of writs for fines and recoveries. And it is ordered, that all and every ſuch affidavit or affidavits as aforeſaid, ſhall be made by ſome attorney or attornies of the courts of *Weſtminſter* Hall, or of the ſeſſions in *Wales*, or of the counties palatine of *Cheſter*, *Lancaſter*, or *Durham*; and ſhall be ſworn before a perſon duly authorized to take affidavits in this court, except where the party or parties reſpectively, at the time of their acknowledging ſuch warrant or warrants of attorney, ſhall be in that part of *Great Britain* called *Scotland*, or in *Ireland*, or in ſome other parts beyond the ſea. And in caſe the ſaid party or parties ſhall be in *Scotland*, then the ſaid affidavit or affidavits ſhall be made by one of the clerks of his majeſty's ſignet, and ſworn before one of the judges or other perſons duly authorized to take affidavits or depoſitions in the court of ſeſſion, or court of exchequer in that part of the united kingdom. But if

the ſaid party or parties ſhall be in *Ireland*, or in any other parts beyond the ſeas, then the ſaid affidavit or affidavits ſhall be made by one of the commiſſioners who hath taken the acknowledgment of ſuch warrant or warrants of attorney. and ſhall be ſworn either before ſome perſon duly authorized to take affidavits in this court, or before ſome magiſtrate of the place where ſuch acknowledgment ſhall be taken, having authority to adminiſter an oath, and in the preſence of a public notary, which notary ſhall alſo certify in writing under his hand and ſeal, as well the due adminiſtering of the ſaid oath, as alſo the name, ſignature, and office of the magiſtrate adminiſtering the ſame." And by another rule of the ſame court made in *Trinity* term 30 Geo. 3. it is ordered, "that from and after the 1ſt day of *Michaelmas* term next, in every common recovery, wherein the tenant or tenants, or the vouchee or vouchees, warrant or warrants of attorney ſhall be taken under a *dedimus poteſtatem*, there ſhall be written on every copy of the *præcipe*, and of ſuch warrant of attorney, having ſuch affidavit or affidavits as is or are required by the rule of this court, made in *Hilary* term, in the 14th year of the reign of his preſent majeſty, to be thereto annexed, the *allocatur* of the Lord Chief Juſtice, or ſome one other of the juſtices of this court, in the ſame or like manner as *allocaturs* are now written on fines taken by *dedimus poteſtatem*; and the copy of the *præcipe* and warrant or warrants of attorney, with the *allocatur* thereon ſhall be filed, as directed by the ſaid rule: and that, at the time of ſigning ſuch *allocatur*, the writ of entry for ſuch common recovery ſhall be produced before the judge ſigning ſuch *allocatur*, who may mark ſuch writ with his title, name, or initials thereof; and ſuch writ ſhall alſo be produced at the time of the arraignment of ſuch recovery." And by another rule of the ſame court, made in *Mich.* 39 Geo. 3. it is ordered, "that from and after the laſt day of that term, no common recovery ſhall be ſuffered to paſs, unleſs the taking of the warrants of attorney for ſuffering any common recovery be before one of the juſtices or barons of his majeſty's court of record in *Weſtminſter* Hall, or one of the ſerjeants at law; or unleſs an affidavit be made and filed, ſtating that the commiſſioners taking the ſame are, to the beſt of the deponent's information and belief, either barriſters of five years ſtanding, or ſolicitors or attornies of ſome of the courts in *Weſtminſter* Hall, the judges of the court of ſeſſions and exchequer, or advocates and clerks to the ſignet of five years ſtanding in *Scotland*." The laſt mentioned rule does not extend to attornies or ſolicitors of the courts of great ſeſſions in *Wales*, or of the counties palatine, therefore they cannot take warrants of attornies under a *dedimus poteſtatem*. As ſoon as the *dedimus poteſtatem* is returned by the commiſſioners, an application muſt be made to the curſitor for a writ of entry; and one of the judges of the C. P. on the production of the affidavit required by the above mentioned rules of 14 Geo. 3. and 39 Geo. 3. which is annexed to a copy of the *præcipe* and warrant of attorney, and alſo on the production of the writ of entry, according to the ſaid rule of 30 Geo. 3. (if he is ſatisfied) ſubſcribes his *allocatur* at the foot of the copy of the *præcipe* and warrant of attorney, and afterwards they are taken with

with a *præcipe* at bar to one of the ſerjeants, who ſubſcribes his name twice at the foot of ſuch *præcipe*, which is written on plain paper, ſtating at the foot of it that the tenant in perſon vouches to warranty R. B. eſq. who by attorney vouches to warranty *Thomas Francis Martin*," (the common vouchee) and the tenant's appearance is afterwards marked by the prothonotary at the foot of the *præcipe*, thus, "at bar, the tenant's appearance is recorded by the court." As the vouchee is not preſent in court to enter into the warranty, there muſt be a writ of *ſummoneas ad warrantizandum*, uſually called a writ of ſummons, the form of which may be ſeen in Wilſ. on Fines, 388. This writ muſt bear teſte the 4th day, incluſive of both days, from the return of the writ of entry, if the fourth day be a *dies juridicus* and a day in term. By the common law this writ of ſummons had nine returns; but by the ſtatute 16 *Car.* 1. c. 6. ſ. 10. the returns were abridged to five, and now by ſtatute 24 *Geo.* 2 c. 48. ſ. 8. are reduced to four incluſive; as if the writ of entry be returnable from the day of *Eaſter* in 15 days, the writ of *ſummons* muſt be returnable from the day of *Eaſter* in five weeks, being the 4th return incluſive; and if there are three vouchees, the writ of ſummons for the 2d vouchee muſt be returnable 4th returns both incluſive from the return of the ſummons of the firſt vouchee; and to bear teſte the 4th day incluſive from the return of the firſt writ of ſummons.

Regularly the warrant of attorney ought to bear date after the teſte of the writ of ſummons; but if it ſhould not, this circumſtance will not invalidate the recovery. Thus where upon error it was inſiſted that the warrant of attorney of the vouchee bore date before the writ of ſummons, but it was anſwered that the vouchee might appear in perſon without any writ of ſummons and make his attorney, and it ſhould be ſo preſumed, and therefore the proceſs, viz. the ſummons, the *dedimus poteſtatem* and warrant made by virtue thereof were ſuperfluous and void. And the court ſaid, that as a common recovery was a common aſſurance, they would never reverſe it, if by any means they could make it good. 1 Lev. 130. *Winne* v. *Lloyd*. S. C. Sir T. Raym. 16. 1 Sid. 213.

The recovery is arraigned of the term in which the writ of ſummons is returnable; therefore if a recovery be intended to be ſuffered of *Michaelmas* term, (for inſtance,) the writ of entry ſhould be returnable on the morrow of *All Souls*, and the writ of ſummons in 15 days of *St. Martin*, and the writ of *dedimus* ſhould ſtate that the writ of ſummons was iſſued returnable at that time. But it ſometimes happens from various cauſes, that the warrant of attorney has not been taken in due time, ſo that the recovery cannot be arraigned of the term it was intended to be; wherefore it becomes neceſſary to apply to the court of C. P. for leave to arraign the recovery in a ſubſequent term. After ſuch leave is obtained, the courſe then is to apply to the maſter of the rolls for an order upon the curſitor to make out a writ of entry returnable the term preceding the taking the acknowledgment of the warrant of attorney, and to make out a writ of ſummons returnable in the next term, and then the vouchee appears by attorney, and imparls from term to term until the term when the recovery is arraigned. As where an application was made to the

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court of C. P. in *Michaelmas* term 1778, to allow a recovery to be arraigned of that term, under the following circumſtances: The *dedimus* was teſted the 26th of *February* 1777, and recited a writ of ſummons returnable the firſt day of *Eaſter* term 1777, but the warrant of attorney was taken at *Bombay* the 17th of *December* 1777; ſo that properly the ſummons ſhould have been returnable, and the recovery had, in *Hilary* 1778. On application to the maſter of the rolls, he ordered the curſitor to make out a writ of entry returnable in *Michaelmas* term 1777, upon which the officer made out a ſummons returnable in *Hilary* term 1778, of which term the tenant's appearance was entered; and then they imparled from *Hilary* to *Eaſter*, and from *Eaſter* to *Trinity*, and from *Trinity* to *Michaelmas* term, when the recovery was arraigned. 2 Black. Rep. 1223. *Gibbons* v. *Stephenſon*. But ſometimes a difficulty occurs how to enter ſuch a recovery properly of record; therefore perhaps the following form may be found ſerviceable. "And the ſaid C. D. (the tenant) in his proper perſon cometh and defendeth his right, when, &c. And thereupon voucheth to warranty E. F. (the vouchee) ſummoned in the county aforeſaid, let him have him here from the day of *St. Hilary* in fifteen days, by the aid of the court, &c. The ſame day is given to the ſaid parties here, &c. And hereupon the ſaid C. D. (the tenant) putteth in his place J. S. and L. K. his attornies jointly and ſeverally againſt the ſaid A. B. (the demandant) to gain or loſe in the plea aforeſaid, &c. At which day here cometh as well the ſaid A. B. (the demandant) in his proper perſon, as the ſaid C. D. (the tenant) by the ſaid L. R. his attorney; and the ſaid E F. (the vouchee) being ſummoned, &c. likewiſe cometh by his attorney, and prays leave to imparl thereto here, until from the day of *Eaſter* in fifteen days, and he hath it, &c.; the ſame day is given to the parties aforeſaid here, &c. At which day here cometh as well the ſaid A. B. (the demandant) in his proper perſon, as the ſaid C. D. (the tenant) by his attorney aforeſaid, and the ſaid E. F. (the vouchee) by his attorney aforeſaid alſo cometh, and he prayeth further leave to imparl thereto here, until from the day of the *Holy Trinity* in fifteen days, and he hath it, &c. the ſame day is given to the parties aforeſaid here, &c. At which day here cometh as well the ſaid A. B. (the demandant) in his proper perſon, as the ſaid C. D. (the tenant) by his attorney aforeſaid, and the ſaid E. F. (the vouchee) by his attorney aforeſaid alſo cometh, and he prayeth further leave to imparl thereto here, until the morrow of *All Souls*, and he hath it, &c. the ſame day is given to the parties aforeſaid here, &c. At which day here cometh as well the ſaid A. B. (the demandant) in his proper perſon, as the ſaid C. D. (the tenant) by his attorney aforeſaid, and the ſaid E. F. (the vouchee) by his attorney aforeſaid, alſo cometh; and the ſaid E. F. (the vouchee) freely warranteth the tenements aforeſaid, with the appurtenances to the ſaid C. D. (the tenant) &c. And hereupon the ſaid A. B. demandeth againſt the ſaid E. F. &c."

The other ſteps neceſſary to perfect the recovery, ſuch as compounding the writ of entry at the alienation office, and the return of it, the iſſuing the writ of ſeiſin, and procuring that alſo to be returned, are the ſame as when the recovery is ſuffered in perſon. But as

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the writ of *dedimus poteſtatem* is returned into the court of chancery, it is neceſſary to ſend a tranſcript of the writ, return, warrant of attorney and caption from thence into the C. B. by mittimus; therefore the entry of the recovery on the roll when it is ſuffered under a *dedimus*, differs from the entry of a recovery ſuffered in perſon in this reſpect, that in the former caſe the mittimus and tranſcript are alſo entered verbatim on the roll. The form of the entry of a recovery with double voucher, where the tenant appears in perſon, and the vouchee by attorney on a warrant taken by a *dedimus poteſtatem* may be ſeen in Theſ. Brev. 102—105. Wilſ. on Fines, 3d ed. 381.

If the vouchee die before the return of the writ of ſummons, the recovery is void; for no judgment can be given until the vouchee appear and make default; but he cannot appear until the return of the writ, and therefore judgment given ſubſequent thereto, will be after his death and conſequently void; and this fact being collateral to the record, may be aſſigned for error. 1 Wilſ. Rep. 35. 42. *Wynne* v. *Wynne*. S. P. 1 Burr. 410. *Sheepſbanks* v. *Lucas*. And the court will, upon an affidavit ſtating the death of the vouchee before the return of the writ of ſummons, ſtay the paſſing of the recovery. 2 Vent. 90. *Sir Thomas Gower's* caſe. So if the writ of ſummons be returnable on a *Sunday*, and the vouchee die on that day, the recovery is void, becauſe *Sunday* being *dies non juridicus* judgment could not poſſibly have been given until the *Monday* following, conſequently judgment muſt have been given after the death of the vouchee. 3 Burr. 1595. *Swann* v. *Broome*. S. C. 1 Black. Rep. 496. 526. So if the judgment be not regularly executed by the return of the writ of ſeiſin, the recovery has no manner of operation. *Sir W. Jones*. 10. *Aubrey* v. *Lord Bridgwater*. Therefore if a ſpecial verdict omit to find a writ of ſeiſin or execution, it cannot be preſumed by the court, and no advantage can be taken of the recovery, nor will the court grant a *venire de novo*. 1 Wilſ. 52. *Witham* v. *Lewis*. S. C. 2 Str. 1184. 4 Brown. P. C. 504. But *Lord Kenyon* in *Goodright* v. *Rigby*. 5 Term. Rep. 179 ſaid that the caſe of *Witham* v. *Lewis*, has always been conſidered as a ſtrange caſe; and the judges of ſucceeding times have been aſtoniſhed, that no application was made to the court of common pleas to rectify the defect in that recovery, according to the uſual practice of that court. But execution may be ſued out, though the tenant in tail die after judgment and before execution, Co. Litt. 351 b. In truth the writ of ſeiſin is never executed, for it is ſufficient if the writ of ſeiſin be ſued out and returned.

A recovery ſuffered by huſband and wife, will bar the wife of her dower. 2 Rep. 74. a. *Lord Cromwell's* caſe. 10 Rep. 43. a. *Portington's* caſe. *Pigott*. 66. it being agreed by all the judges that the wife was named in the recovery that ſhe might be barred of her dower. Plow. 515. *Eare* v. *Snow*. A woman may alſo bar herſelf *of her jointure* by joining her huſband in ſuffering a recovery in the ſame manner, as in levying a fine. A recovery ſuffered by tenant for life, without the concurrence of the perſon in remainder or reverſion, operates as a forfeiture of his eſtate for life, juſt as if he had levied a fine, or made a feoffment in fee. 1 Rep. 15. b. *Sir W. Pelham's* caſe. A recovery ſuffered by

by tenant in tail, paſſes to the recoveror an abſolute fee ſimple derived *out of the eſtate tail*; ſo that if tenant in tail of lands *by purchaſe*, under a ſettlement made by an anceſtor *ex parte maternâ*, with the reverſion in fee by *deſcent ex parte maternâ*, ſuffer a recovery to the uſe of himſelf and his heirs, the lands will deſcend to his heirs *ex parte paternâ*; for the new uſe ariſes out of the eſtate tail, and not out of the reverſion in fee. *Martin* v. *Strachan*, *Willes*'s Rep. 444. S. C. 1 Wilſ. 66. 2 Str. 1179. 4 Bro. P. C. 486. 5 Term Rep. 107. n. (a.) S. P. 5 Term Rep. 104. *Roe* v. *Baldwere*.

A recovery ſuffered by tenant in tail lets in all preceding incumbrances made by himſelf, and renders valid all the acts of ownerſhip which he has exerciſed over the eſtate. As if tenant in tail makes a leaſe not warranted by ſtatute 32 H. 8. c. 28. or confeſſes a judgment, or acknowledges a recognizance, and afterwards ſuffers a recovery, it will operate as a confirmation of thoſe charges which were before defeaſible by the iſſue. 1 Rep. 62. a. b. *Capel*'s caſe. 2 Rep. 52. b. *Cholmley*'s caſe. *Pigott*, 120. 1 Wilſ. 277. *Beck* v. *Welſh*. Cruſe Recov. 284. 2d edit. It is therefore dangerous for a tenant in tail who has in any manner incumbered his eſtate to ſuffer recovery, becauſe the incumbrances become valid, and take place *before* any charge which is made on the lands *after the* recovery. And though a recovory be ſuffered for a *particular purpoſe*, yet it will confirm all *prior* incumbrances. As where tenant in tail mortgages for years, and afterwards in conſideration of marriage ſuffers a recovery for the purpoſe of ſettling a jointure on his wife, it will enure to make good the mortgage; ſo where he confeſſes a judgment, &c. and ſuffers a recovery *to any collateral purpoſe*, it makes good all ſuch incumbrances. So where tenant in tail by leaſe and releaſe previous to his marriage conveyed his eſtate to truſtees to himſelf for life, remainder to his intended wife for life, remainder to the firſt and other ſons of the marriage in tail male; the marriage took effect and there was iſſue a ſon; nineteen years afterwards the huſband ſuffered a common recovery, *and declared it to be to the uſe of A. B. and his heirs in truſt to ſell the premiſes for the payment of his debts*. A. B. ſold the lands for the payment of the debts according to the truſt repoſed in him; the tenant in tail died, and his ſon claimed the lands. The court were of opinion that the recovery enured to the uſes of the ſettlement, and the purchaſer had no title. 3 Burr. 1703. *Goodright* ex demiſe of *Tyrrell* v. *Mead*. But where tenant in tail with the reverſion in fee creates incumbrances, and *his ſon*, on whom the eſtate tail and reverſion deſcends, ſuffers a recovery, it will not like a fine operate ſo as to let the reverſion into poſſeſſion, and make it liable to his father's debts; becauſe a recovery deſtroys all remainders and reverſions, and the fee acquired by the recoveror is derived out of the eſtate tail. Therefore tenant in tail by deſcent, with reverſion in fee in him alſo by deſcent, ought not to bar his eſtate *by fine*, but ſhould ſuffer a recovery, which will effectually prevent the eſtate thus acquired from becoming liable to the debts or contracts of his anceſtor. Cru. on Recov. 287. 2d edit.

William, the heir of William, againſt Gwyn. Caſe 4.

Eaſter, 20th of King *Charles* the 2d. Roll. 260.

OUR lord the king has ſent, to his juſtices of his great ſeſſions in the county of *Brecon*, his writ cloſe in theſe words, to wit; *Charles* the 2d, by the Grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to our juſtices of our great ſeſſions of our county of *Brecon*, greeting: Becauſe in the record and proceedings, and alſo in the giving of judgment, in a plaint which was in the court of the lord *Charles* the firſt, late king of *England*, our moſt dear father, before *Sir Marmaduke Lloyd* knt. and *Walter Rumſey* eſq. late juſtices of our ſaid great ſeſſions, by the writ of him the ſaid late king, between *Sibil William*, late *Sibil Elkin* widow, who was the wife of *Thomas William*, and *Jenkin William* now deceaſed, that he the ſaid *Jenkin* ſhould render to the ſaid *Sibil* her reaſonable dower, which had fallen to her of the freehold which was of the ſaid *Thomas* her late huſband in *Llandevalley*, *Broyullis*, and *Crickaderne*, whereof ſhe had nothing, as it was ſaid, manifeſt error has intervened, to the great damage of *William William* gent. ſon and heir of him the ſaid *Jenkin*, as by his complaint we are informed: we being willing that the error, if any there be, ſhould in due manner be corrected, and full and ſpeedy juſtice done to the ſaid *William* in this behalf, do command you, that if judgment be given thereupon, then you ſend to us diſtinctly and openly, under your ſeal, the record and proceedings aforeſaid, with all things concerning the ſame, and this writ, ſo that we may have them in five weeks from the day of *Eaſter* whereſoever we ſhall then be in *England*, that the record and proceedings aforeſaid being inſpected, we may cauſe to be further done thereupon, for correcting that error, what of right, and according to the law and cuſtom of our realm of *England*, ought to be done. Witneſs ourſelf at *Weſtminſter*, the 16th day of *February*, in the 17th year of our reign.

Writ of error in dower *unde nihil habet.*

The

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Anſwer.

The record and proceedings, of which mention is made in this writ, with all things concerning the ſame, we ſend to our lord the king, at the day and place within contained, to this writ annexed, as within we are commanded. The anſwer of Sir *Richard Lloyd*, knt. and *Arthur Trevor*, eſq. the juſtices within named.

Writ of dower.

Breconſhire to wit. The great ſeſſions of our lord the king of the county of *Brecon*, holden at *Brecon*, in the county aforeſaid, on *Monday* the 19th day of *September*, in the 12th year of the reign of our lord *Charles* the Firſt, late king of *England*, &c. before Sir *Marmaduke Lloyd*, knt. and *Walter Rumſey*, eſq. juſtices of his ſaid late majeſty, of his ſaid great ſeſſions of the ſaid county.—*Charles*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Breconſhire*, greeting: Command *Jenkin William*, that juſtly and without delay he render to *Sibil William*, widow, who was the wife of *Thomas William*, her reaſonable dower, which falleth to her of the freehold which was of *Thomas William*, her late huſband, in *Llandevalley*, *Crickadern*, and *Broyullis*, whereof (1) ſhe has nothing, as

(1) This is called a writ of dower, *unde nihil habet*, and lies only againſt the tenant of the freehold. F. N. B. 346, 347. 7th edit.; the form of the writ is in the regiſter, 170. which varies from the writ in this entry in nothing elſe but the ſtyle of the court. When a writ of dower is intended to be brought, the firſt ſtep is to make out a *præcipe* for the writ, in this form: "*Staffordſhire* to wit; Command A. B. that juſtly and without delay he render to C. D. widow, *who was the wife of T. D.* her reaſonable dower, which falleth to her out of the freehold which was of the ſaid J. D. late her huſband, in the pariſh of E. or pariſhes of E. F. and G. *whereof ſhe has nothing*, as ſhe ſays—Returnable in eight days of the purification of the bleſſed virgin *Mary*." A writ is thereupon made out, which will not be valid, unleſs drawn in the form above mentioned; for where it was "command A. that, &c. he render to E. F. her reaſonable dower, which falleth to her out of the freehold which was *of B. F. late her huſband*" &c. an objection was taken to the writ, becauſe it was not "command A. that, &c. he render to E. F. *who was the wife of B. F. &c.*" for ſhe ought to be named *wife* of B. F. in the beginning of the writ; it being the name by which ſhe has any claim to dower; the court held the objection fatal, and that the omiſſion was not ſupplied by the ſubſequent words "*of B. F. her huſband, &c.*" Cro. Jac. 217. *Fulliam* v. *Harris*. When the writ

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as ſhe ſays, and whereof ſhe complains that the ſaid *Jenkin* deforceth her; and unleſs he ſhall do ſo, and if the ſaid *Sibil* ſhall give you ſecurity to proſecute her claim, then ſummon by good ſummoners the ſaid *Jenkin*, that he be before our juſtices of our great ſeſſions of your county, on *Monday* in our

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is obtained, the proceſs is a ſummons, and *grand and petit cape*. F. N. B. 348. The ſummons muſt be ſerved upon the land. Hob. 133. *Allen* v. *Walter*. And for the avoiding of ſuch ſummons in real actions, without convenient notice to the tenants of the freehold, it is enacted by ſtatute 31 Eliz. c. 3. ſ. 2. "that after every ſummons upon the land in any real action, 14 days at the leaſt before the day of the return thereof, proclamation of the ſummons ſhall be made on a *Sunday* immediately after divine ſervice and ſermon, if any ſermon there be, and if no ſermon there be, then forthwith after divine ſervice, at or near to the moſt uſual door of the church or chapel of that town or pariſh where the land, whereupon the ſummons was made, doth lie; and that proclamation ſo made as aforeſaid ſhall be returned, together with the names of the ſummoners; and if ſuch ſummons ſhall not be proclaimed and returned according to the tenor and meaning of this act, then no grand *cape* to be awarded, but alias and pluries ſummons as the cauſe ſhall require, until a ſummons and proclamation ſhall be duly made and returned according to the meaning of this act." Hence it appears that the ſummons and proclamation muſt be at leaſt 14 days before the return of the ſummons, that is, of the writ of dower; the ſummons being returnable on the day of the return of the writ. The ſheriff, upon the receipt of the writ, makes his warrant in this form: "J. W. eſq. ſheriff of *Staffordſhire*, to M. N. and O. P. my bailiffs for this time only, greeting; by virtue of a writ of dower of our lord the king *unde nihil habet* to me directed, I command you that you command A. B. that juſtly and without delay he render to C. D. who was the wife of J. D. her reaſonable dower, which, &c. (as in the writ) deforceth her; and unleſs he ſhall do it, then ſummon the ſaid A. B. that he be before our juſtices at *Weſtminſter*, in 8 days of the purification of the bleſſed virgin *Mary*, to ſhew wherefore he will not do it; and that after the ſaid ſummons is made, you do, at the moſt uſual door of the pariſh church of the pariſh of E. on *Sunday* next after the ſaid ſummons, immediately after divine ſervice is ended, proclaim the ſame ſummons according to the form of the ſtatute in ſuch caſe made and provided.—Given under the ſeal of my office, &c." The form of the ſummons in conſequence of this warrant from the ſheriff is this, "By virtue of his majeſty's writ of dower *unde nihil habet* to the ſheriff of *Staffordſhire directed*, and by virtue of the ſaid ſheriff's warrant to us directed, we do hereby require and command you, that you render to C. D. &c. (as in the writ) as ſhe alleges, and complains

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our next great ſeſſions to be holden in your county, wherefoever it ſhall happen to be holden in your county, to ſhew wherefore he has not done it, and have there the ſummoners, and this writ. Witneſs ourſelf at *Brecon*, the 3d day of *September*, in the 12th year of our reign. *Pembroke* and *Mont-*

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plains that you the ſaid A. B. keep her out of the ſame; and if you refuſe ſo to do, then we do hereby ſummon you, that you be and appear before his majeſty's juſtices at *Weſtminſter*, in 8 days of the purification, to ſhew cauſe why you do not." Afterwards the ſheriff returns the writ thus indorſed: "Received, 1ſt *January* 1797. Pledges of proſecution, *John Doe* and *Richard Roe*. Summoners of the within named A. B. *Thomas Norris* and *James Simpſon*; and after the aforeſaid ſummons made, to wit, at the moſt uſual door of the pariſh church of E. within ſpecified, within which the tenements within mentioned do lie, upon the Lord's day, to wit, the 5th day of *January*, in the year of our Lord 1797, immediately after divine ſervice and ſermon in the ſaid church was ended, I made proclamation of the aforeſaid ſummons, according to the form of the ſtatute in ſuch caſe made and provided. J. W. eſq. ſheriff."

It has been held, that the proclamation of the ſummons muſt be at *the pariſh church* door, though it lies in another county. Cro. Eliz. 472. Regiſter's caſe; and it muſt appear on the return, that the land lies within the pariſh where the proclamation of the ſummons was made; and that the proclamation was made *after the ſummons*. 1 Mod. 197. *Furnis* v. *Waterhouſe*. Where the lands lie in ſeveral pariſhes or townſhips, it ſeems that a proclamation made at the church or chapel door of *one* pariſh or townſhip is ſufficient within the act. Hob. 133. *Allen* v. *Walter*. But a return that the ſheriff had proclaimed "*the contents of the writ*," is inſufficient, becauſe he muſt proclaim that he made ſummons of the land. Ibid. However, according to the modern practice, it ſeems ſufficient to return that he the ſheriff had made proclamation *of the ſaid ſummons according to the form of the ſtatute*, &c." On the return of the ſummons, the tenant is entitled to an eſſoin, which is entered in the office of the clerk of the eſſoins of the C. B. upon the day of ſuch return; but it cannot be entered *by attorney*: for it is inconſiſtent to ſay that a man *has a legal excuſe* for *not* appearing, when he does really appear by attorney. 2 Wilſ. 164. *Anſon* v. *Jeffreſon*. After the eſſoin is entered by the tenant, it is the duty of the demandant to adjourn it; and if he neglect to do ſo, after a rule given by the tenant, "unleſs the demandant ſhall adjourn the eſſoin, a *non-proſs* will be ſigned," the tenant may ſign a *non-proſs*; which rule and *non-proſs* are given in the office of the clerk of the eſſoins, on rolls kept for that purpoſe. 1 Rich. Pract. of C. P. 26. 5th edit. By the ſtatute 24 Geo. 2. c. 48. ſ. 3. the day of adjournment in a writ of dower is to the *fourth* return next enſuing the return of the writ of dower both incluſive; as if the writ be returnable in 8 days of the purification, the adjournment day is *in one month of Eaſter*

Montgomery. Pledges to profecute, *John Doe* and *Richard Roe*.—Summoners, *John Denn* and *Richard Fenn*.—*John Herbert*, eſq. ſheriff.

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Ordered that L. L. and H. M. ſhall ſue for the demandant, who is an infant, as her next friends.

Breconſhire, to wit. It is conſidered by the court of our lord the king here, that *Lewis Lloyd*, gent. and *Hugh Meredith*, gent. do ſue for *Sibil William*, who is within age, as her next friends, againſt *Jenkin William*, in a plea of dower.—*Charles*, by the grace of God, of *England*, *Scotland*, *France*, and

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Eaſter. But if the tenant do not enter his eſſoin on the return of the ſummons, the demandant may on the day of exceptions, which is the day *next after* the eſſoin day, enter a *ne recipiatur*.

If the tenant neglect to appear on the return of the ſummons, or enter an eſſoin; or, in caſe of an eſſoin being entered, do not appear on the day given by the adjournment of the eſſoin, which, we have ſeen, is the fourth return day after inclusive, the next proceſs, for the demandant to ſue out, is the *grand cape*. The form of the writ, when the default is for not appearing *on the return of the ſummons*, may be thus: "*George* the third, &c. *take* into our hand, by the view of good and lawful men of your county, the third part of 2 meſſuages, 100 acres of land, 10 acres of meadow, and 5 acres of wood, with the appurtenances, in the pariſh of E, in your county, which C. D. in our court before our juſtices at *Weſtminſter*, claims, as the dower of her the ſaid C. D. of the endowment of J. D. her late huſband, againſt A. B. by our writ of dower *unde nihil habet*, for the default of him the ſaid A. B.; and the day of the taking thereof make known to our juſtices at *Weſtminſter* by your letters under ſeal; and ſummon by good ſummoners the ſaid A. B. that he be before our juſtices at *Weſtminſter*, in 15 days of *Eaſter*, to anſwer and ſhew wherefore he was not before our juſtices at *Weſtminſter*, in 8 days of the purification, according as he was ſummoned;" but when the default is for not appearing *on the adjournment day of the eſſoin*, then, "wherefore he did not keep the day given him, by reaſon of his eſſoin, before our juſtices at *Weſtminſter*, in one month of *Eaſter* laſt paſt, and have there the names of thoſe by whoſe view you ſhall do this, and this writ. Witneſs, John Lord Eldon, at *Weſtminſter*, the 9th day of *April*, in the 40th year of our reign." If the ſheriff do not return the writ, the demandant may ſue out an *alias grand cape* at the return of the firſt writ; the form of the entry of the grand cape and alias, when the tenant makes default at the return of the ſummons, may be ſeen in Raſt. 239. a. pl. 4. But if the ſheriff executes the writ, the return is indorſed on it in this form: "By virtue of this writ to me directed, on the 5th day of *April*, in the year within written, I have taken into the hands of our lord the king, by the view of *Oliver Prichott* and *Nicholas Reed*, good and lawful men of my county, the third part of the lands and tenements within mentioned with the

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Re-ſummons.

and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Breconſhire*, greeting: Command *Jenkin William*, that juſtly and without delay he render to *Sibil William*, widow, who was the wife of *Thomas William*, her reaſonable dower, which falleth to her of the freehold which was of *Thomas William*, late her huſband, in *Llandevalley*, *Crickadern*, and *Breyullis*, whereof ſhe has nothing, as ſhe ſays, and whereof ſhe complains that the ſaid *Jenkin* deforceth her, and unleſs he ſhall do ſo, then (2) re-ſummon by good ſummoners, the ſaid *Jenkin*, that he be before our juſtices of our great ſeſ-

[44] ſions of your county, at *Brecon*, in your county, on *Wedneſday* next enſuing, to ſhew wherefore he has not done it, and wherefore he was not in our court before our juſtices of our great ſeſſions of your county, on *Monday* in that ſame ſeſſions in your county, as he was ſummoned: and have there then the ſummoners and this writ. Witneſs *Sir M. Lloyd*, knt. at *Brecon*, the 19th day of *September*, in the 12th year of our reign. Summoners, *John Denn* and *Richard Fenn*.—*John Herbert*, eſq. ſheriff.

Pleas at *Brecon*, in the county of *Brecon*, before *Sir Marmaduke Lloyd*, knt. and *Walter Rumſey*, eſq. juſtices of our lord

the appurtenances, as I am within commanded: and I have, by *Thomas Norris* and *John Sympſon*, given notice to the within mentioned A. B. to be and appear before his majeſty's juſtices at *Weſtminſter*, at the time and place within mentioned, as I am alſo within commanded; ſummoners of the within named A. B. *Thomas Norris*, and *John Sympſon*. J. W. eſq ſheriff." If the tenant neglect to appear on the return of the *grand cape*, the demandant is ſtrictly intitled to judgment of ſeiſin and to an award of a writ of inquiry of damages; but if the tenant appear on the return of the *grand cape*, the demandant, inſtead of inſiſting upon final judgment againſt the tenant for his default to the ſummons, may wave the default, and take an appearance upon the *grand cape*, and ſo in a *petit cape*. 1 Salk. 216, 217. *Staple* v. *Hayden*, S. C. 6 Mod. 4. Anciently this waver could only be, where the tenant, at the return of the *grand cape*, waged his law of *non* ſummons; ſee Co. Ent. 175. b. 176. a. 1 Brown. Ent. 202, 203. but it ſeems now to be ſufficient to ſay, that the demandant releaſes the default of appearance on the return of the ſummons. Robinſ. Ent. 268.

(2) A re-ſummons is neither neceſſary nor uſual; but it is held that it may be by cuſtom. Com. Dig. Pleader. (2. Y.)

lord the now king of his great ſeſſions of the ſaid county, at the great ſeſſions of our ſaid lord the king of the ſaid county, holden at *Brecon* aforeſaid, in the ſaid county, on *Monday* the 19th day of *September*, in the 12th year of the reign of our lord *Charles*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. WILLIAM, the heir of WILLIAM, v. GWYN.

(3) *Breconſhire*, to wit. *Sibil William*, widow, who was the wife of *Thomas William*, by *Lewis Lloyd* and *Hugh Meredith*, who Count.

(3) But if the tenant appear upon the ſummons or in caſe of an eſſoin being caſt, upon the adjournment day of the eſſoin; or if he appear upon the return of the *grand cape*, and the demandant releaſe the default of appearance upon the ſummons; the demandant muſt then count. The declaration in this entry is in the uſual form, except that the demandant, being an infant, ſues by her next friend, inſtead of attorney; and that it is alſo ſometimes the practice to add after *huſband* the words, "by writ of our lord the king of dower whereof ſhe has nothing, &c." But this addition does not ſeem neceſſary. If the lands lie in ſeveral pariſhes, it ſeems the better way to ſpecify the particulars in each pariſh: as the third part of, &c. in the pariſh of A. and the third part of, &c. in the pariſh of B. &c. The count muſt demand *a third part* of the whole premiſes, as a third part of two meſſuages, 100 acres of land, &c. for if the demand be of *three meſſuages and* 50 *acres of land*, it is bad, though three meſſuages and 50 acres of land are the third part of the whole eſtate. 3 Lev. 169. *Whelpdale* v. *Whelpdale*. The word tenement has been held to be of too uncertain and general a deſcription; becauſe in real actions the premiſes muſt be deſcribed with ſuch preciſion and certainty as to enable the ſheriff to deliver ſeiſin of them to the demandant; but *tenement* is a word which may ſignify either *houſes* or *lands*, *or any thing elſe that may be holden*; and a judgment in dower for *tenements* was reverſed in the K. B for that reaſon, though the tenant confeſſed the action, and the ſheriff had delivered ſeiſin. 2 Ld. Raym. 1384. *Kerry* v. *Kent*, S C. 8 Mod. 355. 1 Str. 625. The word tenement was at that time holden to be alſo too uncertain *in an ejectment*, and for the ſame reaſon. 2 Str. 834. *Goodtitle* v. *Walton*. 3 Wilſ. 23. *Goodtitle* v. *Flood*. But as ejectments are under the control of the courts where they are brought, and the leſſor of the plaintiff muſt at his peril ſhew the premiſes he has recovered to the ſheriff, it was afterwards held that *tenement* was well enough in an *ejectment*. 1 Burr. 623. *Cottingham* v. *King* 5 Burr. 2673. *Connor* v. *Weſt*. 1 Term Rep. 11. *Doe* v. *Denton*. But the authority of theſe caſes has been over-ruled in a late caſe, where an ejectment for a meſſuage *and tenement* was adjudged bad after verdict, and judgment was arreſted. 1 Faſt, 441. *Doe* v. *Plowman*. If the count does as uſual demand *a third part*, &c. and the lands are of gavelkind tenure, the tenant may aver them to be ſo, and plead in bar, that by cuſtom the wife is intitled to be endowed of a *moiety*, *dum ſola & caſta remanſerit*, and that ſhe married

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who are admitted by the court of our lord the king here to proſecute for the ſaid *Sibil*, who is within age, as her next friends, demands againſt *Jenkin William* a third part of the manor of *Crickaderne* and *Rhywe*, and of 14 meſſuages, two water corn griſt mills, 500 acres of land, 60 acres of meadow, 100 acres of paſture, 100 acres of wood, 200 acres of furze and heath, with the appurtenances, and 80 ſhillings of rent, in *Llandevalley*, *Broyullis*, and *Crickaderne*, as her dower, of the endowment of the ſaid *Thomas*, her late huſband, &c.

Nil dicit. (4) And the ſaid *Jenkin*, by *William Watkins*, his attorney, comes, and ſays nothing in bar or preclusion of the ſaid *Sibil*, whereby

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ried again; or if the demandant has remained ſingle, it ſeems it will be equally a good defence to ſay that ſhe is intitled to be endowed of a moiety *dum ſola*, &c.; for it ſhall not be in her power to wave her cuſtomary dower, and take a third part at common law, becauſe in that caſe ſhe would be intitled to retain her dower, although ſhe married again. 1 Leon. 133. *Hunt* v. *Gilborn*'s caſe. S. C. Cro. Eliz. 121. S. P. Ibid. 825. *Davies* v. *Selby*. Rob. Ent. 245. Co. Litt. 33. b. Rob. Gavelkind 179—183, Sav. 91.

(4) After the demandant has counted, it is held in many caſes that the tenant may pray a view. Co. Ent. 177, a. Raſt. Ent. 228. b. 232. b. 239. b. Clift. 299. 3 Lev. 169. *Whelpdale* v. *Whelpdale*. Ibid. 220. *Bernes* v. *Rich*; but Dy. 179. a. pl. 41. 2 Inſt. 481. 45 Edw. 3. 17. pl. 3. Fitz. View 55. 2 Lev. 117. *Aſtmal* v. *Aſtmal*, are to the contrary; and it is probable, that the ſtrong inclination of the court would be to diſcountenance, if not diſallow, the plea, being a dilatory; as it neceſſarily occaſions great delay in a demand much favoured in law, and the widow is in the mean time without any ſupport. It is now held that an imparlance is not to be granted in dower. Barnes, 2. *Foſter* v. *Kirkley*. At common law, if the huſband died ſeiſed of the land, the heir was not entitled to a view, becauſe the law preſumed he knew the lands which his anceſtor had at the time of his death. 2 Inſt. 481. But if the huſband *aliened* the land, the tenant was entitled to a view at the common law; but by ſtatute of *Weſtminſter* 2. (13 *Edw.* 1.) c. 48. the view is taken away where the huſband aliened the lands to the tenant, or his anceſtor. Therefore if the tenant in either of theſe caſes demands a view, the demandant may counterplead; and where the counterplea is, becauſe the huſband had aliened, the word *alienavit* is proper, being uſed in the ſtatute. 3 Lev. 220. *Bernes* v. *Rich*. 3 Lev. 168. *Whelpdale* v. *Whelpdale*. The form of the plea and counterplea may be ſeen in Clift. 299. So the tenant may pray a view *before* the count. Cro. Car. 351. *Wickham* v. *Enfield*. Willes's Rep. 347. *Davis* v. *Lees*. Iſſue may be taken on the counterplea, Raſt. Ent. 239. b. If the tenant demurs to the counterplea, and it is adjudged againſt him, the judgment will be peremptory. Com. Dig. Pleader (2 Y. 3). But where the view

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whereby the ſaid *Sibil* remains undefended therein againſt the ſaid *Jenkin*; judgment that the third part of the manor, tenements, and rent aforeſaid with the appurtenances, be taken into the hands of our lord the king, and the day, &c. and that he be ſummoned that he be on *Monday* in the next great ſeſſions, &c. whereſoever, &c. to hear their judgment thereon, &c. At which day here, to wit, at *Brecon* aforeſaid, in the county aforeſaid, in the next great ſeſſions of our lord the king there, held on *Monday* the 3d day of *April*, in the 13th year of the reign of our lord *Charles*, now king of *England*, &c. before

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Petit cape.

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is granted, the tenant is again entitled to the ſame eſſoin as before, and at the return of the view, or the adjournment of the eſſoin, the demandant muſt count *de novo*. If the tenant pleads non-tenure, jointenancy, &c. in abatement of part of the demand, the demandant may *abridge* or narrow her demand to the reſidue, and the writ will remain good; and ſhe may do ſo though the tenant does not plead in abatement. See *poſt.* 330. *Dennis* v. *Dennis*. Lev. Ent. 76. The rule upon this ſubject is laid down by Juyn Chief Juſtice in 14 H. 6. 3, 4. Bro. *Abridgement*, 12. who ſaid, "that in all caſes where the writ is *de libero tenemento* generally, as in aſſize and writ of dower, where the writ is "her reaſonable dower, which falleth to her *of the freehold* of W. her huſband," the demandant may abridge his plaint or demand; and the reaſon is, "becauſe although he abridges ſome acres, yet the writ remains true as to the reſt, it being *liberum tenementum* ſtill; but in *a præcipe quod reddat, where a certain number of acres is demanded,* the demandant cannot abridge, for he would falſify his writ: and where a writ is acknowledged to be falſe in part, it muſt abate in the whole; and even in *an aſſize de libero tenemento* in A. and B. the plaintiff cannot abridge his demand *as to all* in B. for his writ would be falſe; and ſo note the difference."—See ſtat. 23 H. 8. c. 3. See alſo 3 Lev. 68. *Chetham* v. *Sleigh*. Herne, 342.

There are ſome pleas which may be pleaded *in abatement*; as antient *demeſne*, 1 Rol. Abr. 322, (E.) pl. 2. Rob. Ent. 250. Aſt. Ent. 297. which may be pleaded even after a releaſe of the default of appearance to the ſummons upon the return of the grand cape; or in other words, though the tenant does not appear until the return of the grand cape. 1 Roll. Abr. 324. (H.) pl. 1. Or that the demandant married pending the action: ſee the form of the plea, Co. Ent. 173. b. The plea of *non-tenure* either of the whole or part, though uſually called a plea in abatement, concluding with praying judgment of the writ, is not ſtrictly a plea in abatement, though a dilatory; for ſo far from giving the demandant a better writ, the plea is that the tenant is not liable to the action, inaſmuch as he does not hold the land in any ſhape; and beſides, it is frequently pleaded as to part, along with a plea *in bar* to the reſt. See the form

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Judgment of ſeiſin.

before Sir *Marmaduke Lloyd*, knight, and *Walter Rumſey*, eſq. juſtices of our ſaid lord the king of the great ſeſſions of his ſaid county, comes the ſaid *Sibil*, by her ſaid next friends, and the ſaid *Jenkin* does not come, and the ſheriff now teſtifies the day of the taking, &c. and that he ſummoned, &c. Therefore it is conſidered that the ſaid *Sibil* recover her ſeiſin of the third part aforeſaid, with the appurtenances, againſt the ſaid *Jenkin* by default, &c. and the ſaid *Jenkin* in mercy, &c. Afterwards, to wit, on the ſaid *Monday*, the 3d day of *April*, the ſaid *Sibil*, by her ſaid next friends, ſays that the ſaid *Thomas* her

Raſt. Ent. 231. a. b. 232. b. 1 Bro. Ent 205 Clift. 303. pl. 11. Rob. Ent. 246 1 Lut. 716, 717. when *non-tenure* is pleaded to part, and the demandant admits the plea, ſhe may abridge her demand to the reſidue, as we have already obſerved.

As to pleas in bar in this action, they are of two ſorts; one denying the right of the demandant to any dower at all; and the other admitting her right, but alleging ſome excuſe for not having aſſigned it before. Under the former head are included the following, among other pleas; as that the demandant's huſband made a feoffment of the lands to the tenant, and was afterwards attainted of treaſon: and a replication that her huſband was pardoned will not, it ſeems, be any anſwer; for her title begins by her marriage, and muſt *continue* and be conſummated by the death of the huſband; but the attainder *interrupts* her title as an elopement by her would have done; and this interruption is not helped by the ſubſequent pardon. 1 Leon. 3. Maynye's caſe. 2 Hawk. P. C. c. 49. ſee ſtatute 5 and 6 Edw. 6. c. 11. ſ. 13. So the tenant may plead in bar that the demandant's huſband was never ſeiſed of ſuch an eſtate in the lands that ſhe can have any legal claim to be endowed of them; as that he was only tenant for life, or donee in ſpecial tail by a former wife; this is uſually termed a plea of *ne unques ſeiſie que dower*; ſee the form of the plea. Raſt. Ent. 230. a. Co Ent. 176. a. Herne. 340. Rob. Ent. 237. 1 Bro. Ent. 203. Clift. 203. pl. 12. Or the tenant may plead the former plea as to part with one or more pleas to the reſidue. Herne. 340. Rob. Ent. 237. 279. Clift 303. pl. 13. So the tenant may plead that the demandant and her ſuppoſed huſband were never accoupled together in lawful matrimony; and if ſhe replies ſhe was married at B. in ſuch a dioceſe, the court will ſend a writ to the biſhop to certify whether there was a marriage or not; and as the fact is to be tried and determined by his certificate, (ſee the form as well of the pleadings as of the writ and certificate. Raſt. Ent. 228. a. 228. b. Co. Ent. 180. a. b. 181. a. Rob. Ent. 240. 1 Bro. Ent. 204.) therefore it muſt ſtate poſitively either that A. and B. were lawfully accoupled together in lawful matrimony, or that they were not ſo. 9 Rep. 19. b. Bedingfield's caſe. 2d. Towns. Judg. 95, 96. Dy. 368.

her late husband, &c. died seised of the manor, tenements, and rent aforesaid with the appurtenances, and prays a writ of our said lord the king, as well to have full seisin given her of the third part aforesaid with the appurtenances, as to enquire of the damages, &c. and it is granted to her returnable here at *Brecon*, in the said county, on *Tuesday* next ensuing, &c. At which day here, to wit, at *Brecon* aforesaid, in the county aforesaid, &c. before the said justices, &c. comes

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Demandant says that her husband died seised, and prays a writ, as well of seisin, as of inquiry of damages.

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368. b. 313. If it state *evidence* only it is insufficient, and the court will send another writ to the bishop to make another certificate. 2d Towns. Judg. 96. If the marriage was solemnized abroad, or in *Scotland*, so that the court cannot send a writ to any bishop, the lawfulness of the marriage must of necessity be tried by a jury, and therefore the replication must conclude to the country, and the issue will be tried in the county where the venue is laid. 2 H. Black. 145. *Ilderton* v *Ilderton*. The tenant may also plead that the demandant eloped from her husband, and lived with another person in adultery during the coverture. Rast. Ent. 230. a. 1 Bro. Ent. 204. 2 Bro. Ent. 109. Rob Ent. 260. To which the demandant may reply either that she did not elope. Rast. 230. a. 2 Bro. Ent. 109. Rob. Ent. 263. Or that she was afterwards reconciled to her husband. Dy. 107. a. 1 Bro. Ent. 204. The tenant may also plead a divorce *a vinculo matrimonii*. Co. Litt. 32. a. Or he may plead a jointure, made by the demandant's husband on her, before marriage. Co. Ent. 172. a. b. or that it was made after marriage, and the wife agreed to it after her husband's death. Co. Ent. 171. b. 172. a. Rob. Ent. 261. So the tenant may plead that the husband levied a fine, and the demandant made no claim within five years after his death. Co. Ent. 171. a. Clift. 305. to which she may say that she brought her action of dower within five years. Co. Ent. 171. b. Or the tenant may plead that the demandant and her husband levied a fine, or suffered a common recovery of the lands; so the tenant may plead an outstanding term created before the coverture, and pray that the demandant may not have execution before the end of the term. Rob Ent. 237. or that there was a demise for years before coverture, and praying that the demandant may be endowed of the reversion and rent. And if the tenant does not plead such term, he cannot set it up afterwards as a prior title to an ejectment, brought by tenant in dower after her recovery to obtain possession. 1 Salk. 291. *Lindsey* v. *Lindsey*.

As to the other sort of pleas, in bar which admit the right of dower, but allege some excuse; the tenant may plead that the demandant detains the deeds and evidences belonging to the estate, and that he was always ready to assign her dower if she would deliver them, &c. Rast. 229. b. If the demandant replies that she is ready to deliver them to the tenant, and brings them into court, judgment is given for her immediately. Rast. 230. a. The demandant may also reply that she does

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comes the ſaid *Sibil*, by her next friends, &c. and the ſheriff, to wit, Sir *William Lewis*, bart. now returns that, by virtue of the ſaid writ, on the 5th day of *April*, in the 13th year aforeſaid, he cauſed the ſaid *Sibil* to have full ſeiſin of the third part of the manor, tenements, and rent aforeſaid, with the

not detain the deeds, &c.; but it is a dangerous replication, for if the jury find it falſe, ſhe will loſe her dower. Hob. 199. *Brickhead* v. Archb. of *York*. So the tenant may plead that he has always been and ſtill is ready to render dower, and pray that the demandant may not have damages. Raſt. 236. b. 237. a. 1 Bro. Ent. 205. For if the tenant plead it at the return of the ſummons, that is, of the writ, he will be excuſed from paying meſne profits and damages for the detention of the dower, unleſs the demandant has requeſted her dower. Co. Litt. 32. b. if ſhe has, it muſt be ſtated in the replication, and iſſue may be taken upon it. Harg. Co. Litt. 33. a. note (1.) 1 Lutw. 717. Therefore as the heir is not bound to aſſign dower until he be requeſted, Lord Coke recommends it to the widow, to demand her dower in the preſence of witneſſes, as ſoon after her huſband's death as ſhe can. Co. Litt. 32 b. If ſhe admits the plea and has judgment, although ſhe will not recover meſne profits and damages from the death of her huſband until the commencement of the ſuit, yet ſhe will be entitled to receive them from the commencement of the ſuit to the award of the writ of inquiry: ſee the form of the judgment and writ of inquiry, 1 Rich. Pract. C. P. 509. 5. edit. Barnes 234. Penrice's caſe.

If iſſue be joined on any plea which denies the right of dower, except *ne unques accouple*, which we have ſeen, is to be determined by the biſhop's certificate, the jury proceſs is the ſame as in perſonal actions in the C. B. viz. *a venire facias*, and *a habeas corpora juratorum*; Poſt. 340. *Dennis* v. *Dennis*. 2 Wilſ. 121. *Robins* v. *Crutchley*; and by ſtatute 24 Geo. 2. c. 48. ſ. 4. it is enacted, "that in all writs of dower *unde nihil habet*, after iſſue joined, it ſhall not be needful or requiſite to have above 15 days between the teſte and return of the *venire facias*, or any other proceſs to be ſued out for the trial of the ſaid iſſue, but that the writ of *venire facias* and other proceſs, after iſſue joined until judgment be given, having only 15 days between the teſte and return thereof, ſhall be good and effectual in law as is uſed in perſonal actions."

At the common law there were no damages in dower; but by ſtatute of Merton, 20 H. 3. c. 1. it is enacted, "that if a widow ſhall recover her dower of the lands *whereof her huſband died ſeiſed*, the tenant ſhall yield damages, that is to ſay, the value of the dower from the time of the death of her huſband until the day ſhe ſhall have judgment to recover ſeiſin;" and by the ſtatute of Gloceſter, 6 Edw. 1. c. 1. which gives coſts in all caſes where the party is entitled to damages, coſts are given in this action. If the jury find a verdict for the demandant, they ought alſo to find, 1. that her huſband

died

the appurtenances, that is to ſay, of 3 meſſuages, 1 mill, 100 acres of land, 6 acres of meadow, 20 acres of paſture, and 10 acres of wood, with the appurtenances, called and known by the ſeveral names of *Tyrallan-iſſa*, *Tyr-yllan-yrba*, *Tyrillan* and *Tye-my*, in *Llandevalley*, in the ſaid county, and of 2 meſſuages,

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died ſeiſed, and alſo of what eſtate, and the time of his death, to intitle her to meſne profits and damages for detaining her dower under the ſtatute of Merton. 2. the annual value of the land; 3. they muſt aſſeſs the damages on account of the detention of her dower, and 4. coſts. Co. Lit. 33. a. Poſt. 331. *Dennis* v. *Dennis*. And the demandant has thereupon judgment to recover ſeiſin of a third part of the tenements in demand in ſeveralty, by metes and bounds, and the meſne profits and damages. See the form 2d Townſ. Judg. 102. pl. 25, 26. Poſt, 331, 332. But if the jury omit to find either the whole or any part thereof, the omiſſion may be ſupplied by a writ of inquiry. 1 Leon. 92. *Butler* and *Ayres'* caſe. 2d Townſ. Judg. 114. pl. 31. 111. pl. 46. As where the jury find that the huſband died ſeiſed, but omit the reſt, a writ of inquiry may be awarded to ſupply the omiſſion, 2d Townſ. Judg. 100, 101. pl. 22, 23. So where the jury neglect to find damages for the detention of the dower and coſts. Ibid. 102. pl. 24. Or the demandant may remit the value and damages, Ibid. 100. pl. 21. and as damages and coſts are added by ſtatute, to the judgment given by the common law to recover ſeiſin, the judgment as to the latter may be affirmed in a writ of error, and the judgment for the damages reverſed, becauſe they are diſtinct in their nature; and a writ of error lies after judgment in ſeiſin, and before judgment for damages. 1 Lev. 38. *Aleworth* v. *Roberts*. Harg. Co. Lit. 32. b. note (4). And upon this principle it ſeems to be, that where there is judgment to recover ſeiſin either by default, or upon verdict, where the jury have neglected to find any thing elſe, and the writ of ſeiſin is executed, and the *tenant* dies before there is any judgment for the value and damages, the demandant cannot have a *ſcire facias* either againſt the heir or terre-tenants, for the purpoſe of ſuing out a writ of inquiry of ſuch value and damages; becauſe when the tenant dies before judgment given for them, it remains a judgment at common law. 1 Lev. 38. *Aleworth* v. *Roberts*. S. C. 1 Sid. 188. S. C. cited 3 Lev. 275. *Mordant* v. *Thorold*. So where *the demandant* dies after judgment of ſeiſin, but before the execution of a writ of inquiry for the value and damages, her perſonal repreſentative ſhall not have a *ſcire facias* for the value and damages. 1 Salk. 251. *Mordant* v. *Thorold*. S. C. 3 Lev. 275.

In the preſent caſe there ought to have been judgment of ſeiſin without an award of a *grand* or *petit cape*; the former proceſs, which it ſeems to be, is erroneous, becauſe it never lies after an appearance in chief by the tenant, as in this caſe; the latter is equally erroneous, becauſe the *nihil dicit*, or default

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2 meſſuages, 30 acres of land, 6 acres of meadow, 10 acres of paſture, and 10 acres of wood, with the appurtenances, in *Llandevalley* aforeſaid, now or late in the tenure or occupation of *Henry John Madock*, and of 6 acres of meadow, 3 acres of paſture, and 3 acres of wood, with the appurtenances, in

fault is in the *ſame* ſeſſions or term which the tenant appeared in. 1 Bro. Ent. 202. 204. Poſt, 46. Indeed if the default be in a term *ſubſequent* to the appearance a *petit cape* muſt iſſue. Poſt, 46. Herne 332, 333. Ibid. 339. Rob. Ent. 243. There ſeems to be no difference in the form of a *grand* or *petit cape*, except that the words "and the day, &c." are omitted in the latter. The form of the entry it ſeems, ſhould have been after the words "*therein againſt the ſaid Jenkin, undefended*;" thus, "Therefore it is conſidered that the ſaid C. D. recover, againſt the ſaid A. B., her ſeiſin of the third part above demanded, with the appurtenances, to be held by her in ſeveralty by metes and bounds, and the ſaid A. B. in mercy, &c. And thereupon the ſaid C. D. ſays, that J D. her late huſband, on, &c died ſeiſed of the tenements aforeſaid, with the appurtenances, in his demeſne as of fee, and prays a writ of our ſaid lord the king, to be directed to the ſheriff of the ſaid county of *Brecon*, as well to give her full ſeiſin of the third part aforeſaid, with the appurtenances, to be held by her in ſeveralty by metes and bounds, as to inquire of the damages: and it is granted to her returnable here on, &c. At which day here comes the ſaid C. D. by her ſaid attorney, and the ſaid ſheriff, to wit, J. W. eſq. now returns, that he by virtue of the ſaid writ to him directed, on the day of laſt paſt, did cauſe the ſaid C. D. to have full ſeiſin of the third part of the tenements aforeſaid with the appurtenances, that is to ſay, of one meſſuage, &c. (here deſcribe the premiſes delivered by the ſheriff to the demandant, and in whoſe occupation they are, according to the deſcription in the recital,) to hold the ſame to the ſaid C. D. in ſeveralty, by metes and bounds, for and in the name of the whole dowry of the ſaid C. D. of the tenements aforeſaid with the appurtenances, happening to her by the death of the ſaid J. D. her late huſband, as by the ſaid writ he was commanded, &c. The ſaid ſheriff alſo returns here a certain inquiſition taken before him, at the houſe of at S. in the ſaid county, the day of laſt paſt, by the oath of twelve, &c. by virtue of the writ aforeſaid taken, by which it is found, that the ſaid J. D. heretofore the huſband of the ſaid C. D. in the ſaid writ named, on the day of in the year of our Lord died ſeiſed of and in the ſaid tenements with the appurtenances, in the ſaid writ ſpecified in his demeſne as of fee, and that the ſaid tenements with the appurtenances, are of the clear yearly value in all iſſues beyond repriſes of 300*l*., and that three years are elapſed from the death of the ſaid J. D. until the ſuing out of the ſaid inquiſition, and that the ſaid C. D. has ſuſtained damages by reaſon of the detaining of the ſaid dower, beyond the value aforeſaid, and alſo over

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in *Llandevalley* aforeſaid, late in the tenure or occupation of *Lawrence Boys*, and of and in 10 acres of paſture, with the appurtenances, called *Tir-y-Kilbache* in *Llandevalley* aforeſaid, in the county aforeſaid, to be holden by the ſaid *Sibil*, as her dower of the ſaid tenements, with the appurtenances, in ſeveralty

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and above her coſts and charges by her about her ſuit in this behalf expended, to 8 *l.* and for thoſe coſts and charges to 40 ſhillings. Therefore it is conſidered, that the ſaid C. D. recover againſt the ſaid A. B. as well the value of the third part of the tenements aforeſaid with the appurtenances, from the time of the death of the ſaid J. D. her late huſband, until the ſuing out of the ſaid inquiſition, which ſaid value amounts to 300*l.* as her damages aforeſaid to 82*l.* by the inquiſition aforeſaid, in form aforeſaid found, and alſo 100*l.* 10*s.* by the court here adjudged of increaſe to the ſaid C. D. at her requeſt, for her coſts and charges aforeſaid, which ſaid value and damages in the whole amount to 482*l.* 10*s.*" &c. 1 Rich. Prac. C. P. 409. 5th edit. It ſeems neceſſary to ſerve the tenant with a notice of executing the writ of inquiry; for though perſonal notice is not neceſſary to be given in real actions, but the tenant ought to take notice, becauſe the writs, namely, the ſummons, &c. are always executed upon the land, and not elſewhere; yet by the judgment to recover ſeiſin the ſuit is at an end at common law, and the damages for the value of the land are added by the ſtatute of Merton 20 H. 3. c. 1. and found in damages only; therefore notice muſt be given of executing the writ of inquiry in this as in other caſes of writs of inquiry; and if it be not, the court will ſet aſide the inquiſition, and order the money levied under it to be reſtored to the tenant, 3 Lev. 409. *Perkins* v. *Lambe.* The writs of ſeiſin and of inquiry of damages are now generally blended together in the ſame writ, which may be in this form: "*George* the Third, &c. know you, that C. D. who was the wife of J. D. has in our court, before our juſtices at *Weſtminſter*, by the judgment and conſideration of the ſaid court, recovered by our writ of dower, *unde nihil habet* againſt A. B. a third part of two meſſuages, 100 acres of land, 10 acres of meadow, and 5 acres of wood, with the appurtenances, in the pariſh of E. in your county, as her dower, of the endowment of J. D. late her huſband, by the default of him the ſaid A. B.; we therefore command you, that without delay you give the ſaid C. D. full ſeiſin of the third part above demanded with the appurtenances, to be held by her in ſeveralty by metes and bounds; and in what manner you ſhall execute this writ, make known to our juſtices at *Weſtminſter* in 15 days of *Eaſter* now next enſuing; we alſo command you, that by the oath of good and lawful men of your county, you diligently inquire whether the ſaid J. D. died ſeiſed in his demeſne as of fee (or of fee tail) of and in the ſaid two meſſuages, 100 acres of land, 10 acres of meadow, and 5 acres of wood, with the

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ſeveralty by metes and bounds, according to the exigence of the ſaid writ: and as to the inquiry of damages the ſheriff has done nothing thereon.

Roll of warrants of attorney received before Sir *Marmaduke Lloyd*, knt. and *Walter Rumſey*, eſq. juſtices of our lord the king of his great ſeſſions of the county of *Brecon*, in the great

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appurtenances, in the pariſh of E. aforeſaid; and if by the ſaid inquiſition you ſhall find that he died ſo ſeiſed, then you will inquire what is the clear yearly value of the ſaid tenements with the appurtenances, in all iſſues beyond reprizes; and how much time has elapſed ſince the death of the ſaid J. D.; and alſo what damages the ſaid C. D. has ſuſtained by reaſon of the detaining of the ſaid dower; and the inquiſition which you ſhall make in the premiſes you certify to our juſtices at *Weſtminſter*, on the day above mentioned, under your ſeal, and the ſeal of thoſe by whoſe oath you ſhall make the ſaid inquiſition, and this writ. Witneſs, &c." When the ſheriff has executed this writ of ſeiſin, the demandant muſt bring *an ejectment* to get into poſſeſſion.

Having thus conſidered the writ of dower *unde nihil habet*, it may not perhaps be improper to take ſome notice in the next place of another real action, which of late years is become not an uncommon one; I mean, a writ of right. Although much is ſaid in the books of commencing this action at firſt in the court baron, and removing it afterwards into the county court by the writ of *tolt*, and from thence into the common pleas by the writ of *pone*, yet it ſeems, this circuitous method is very unneceſſary, and only tends to create confuſion; for it is held to be the moſt uſual and ſafe way for the demandant to ſue out the writ returnable immediately into the common pleas. Booth, 91. This is generally called a writ of *right cloſe* "*Quia dominus remiſit curiam*;" but theſe words are not now added after the teſte of the writ, as uſed to be the practice formerly, becauſe the lord's licence is not material or traverſable, and the recovery in the action in the common pleas is as valid without ſuch licence as with it. F. N. B. 5. F. 6. B. 7th edit. This action was never commenced in the court baron for lands holden *of the king in chief*, but the writ was directed to the ſheriff of the county returnable into the common pleas; and hence it is, that in ſome writs are inſerted the words "*which he* (the demandant) *holds of us in chief*," without regarding the truth or falſehood of them; but this inſertion ſeems to be as unneceſſary as the former, and is now for the moſt part omitted: and therefore Mr. Serjt. *Wilſon* is miſtaken in calling the writ of right in *Tyſſen* v. *Clarke*, 3 Wilſ. 419. 541. 558. a writ of *right patent*, for it was a writ of *right cloſe*. This writ can only be brought by *tenant in fee-ſimple* againſt the *tenant of the freehold* at the leaſt. F. N. B. 3. E. 7th edit. If the action be upon the demandant's own ſeiſin; it muſt be brought within 30 years, if upon the ſeiſin of his anceſtor, within 60 years after the right has accrued, by the ſtatute of limitations, 32 H. 8. c. 2. ſ. 3.

great ſeſſions of our ſaid lord the king, of the ſaid county, holden at *Brecon* in the ſaid county, on *Monday* the 19th day of *September*, in the 12th year of the reign of our lord *Charles*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c.

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ſ. 1. 3. 1 Bulſ. 162. *Herne* v. *Lilborne*.

When an action is meant to be brought, the firſt ſtep is to make out a *præcipe* for the writ in this form. "*Berkſhire*, to wit, Command *Elizabeth Druce* widow, that juſtly and without delay ſhe render to *Thomas Dee* and *Ann* his wife, 4 meſſuages, 4 gardens, and 4 acres of land, with the appurtenances, in the pariſh of *Thatcham*, in *Berkſhire*, which they claim to be the right and inheritance of the ſaid *Ann*. Returnable in 8 days of *St. Hilary*." Accordingly the curſitor makes out the writ, the form of which may be ſeen, 3 Wilſ. 558. *Tyſſen* v. *Clarke*. After ſuing out the original, the next ſtep is, to have the tenant ſummoned; the ſummons ought regularly to be upon the land; but in truth no actual ſummons is made either in this or any other real action, though the names of ſummoners are of courſe returned by the ſheriff upon the writ. The ſtatute 31 Eliz. c. 3. ſ. 2. requires proclamation to be made in this action, as, we have already ſeen, it does in dower; therefore the ſheriff on receipt of the writ makes out his warrant to his bailiff to ſummon the tenant and make proclamation; the bailiff makes his return to the ſheriff, and he indorſes his return on the writ in the ſame manner, *mutatis mutandis*, as we have already ſhewn in the writ of dower, ſee *ante*, 43. a. note (1). The ſummons muſt be ſerved 15 days before the day of the return of the writ, otherwiſe the tenant may wage his law of non-ſummons; and 15 days before the 4th day after the return will not ſerve. Booth 24. 3 Wilſ. 558. On the 4th day after the return of the writ, the tenant may enter an eſſoin with the clerk of the eſſoins, but it muſt be in perſon and not by attorney; the eſſoin muſt then be adjourned by the demandant, who will otherwiſe be non-proſſed, if the tenant enters a *ne recipiatur* with ſuch clerk, and gives a rule to the demandant to adjourn the eſſoin. Booth, 92. The day of the adjournment of the eſſoin is to the 4th return, both incluſive, by ſtatute 24 Geo. 2. c. 48. When the action is brought againſt jointenants, coparceners, or tenants in common, each of them is intitled to one eſſoin; and if one only enters an eſſoin, a continuance by *dies datus* is given to the others until the adjournment day of that eſſoin, and the ſame thing is done alternately until each has had his eſſoin; as where the action is againſt A. B. and C. A. enters an eſſoin, B. and C. appear, a day is given to them to the adjournment day of A's eſſoin; on that day B. enters an eſſoin. A. and C. appear, a day is given to them to the adjournment day of B's eſſoin; on that day C. enters an eſſoin, A. and B. appear, a day is given to them to the adjournment day of C.'s eſſoin, (for an eſſoin is allowed in this action both before and after appearance,) therefore if the writ were returnable on the morrow of *All Soul's* the adjournment day of the laſt eſſoin would not be until three weeks after

Eaſter

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Breconſhire to wit, *Jenkin William* puts in his place *William Watkins* againſt *Sibil William* in a plea of dower, warrant of attorney for tenant; the demandant as aforeſaid, is within age, Therefore, &c.

Eaſter. At the common law A. was entitled to another eſſoin on the adjournment day of C.'s eſſoin, and B. and C. had a right to be again ſucceſſively eſſoined, as before, *ſimul et viciſſim*, or, as it was uſually called, *fourcher per eſſoign*, to the great delay and vexation of the demandant; but this miſchief was remedied as to joint-tenants, coparceners, and tenant in common by the ſtatute of *Weſtminſter* 1, (3 Edw. 1.) c. 43. and as to huſband and wife, ſeiſed in right of the wife, by the ſtatute of *Gloceſter* (6 Edw. 1.) c. 10. If the tenant does not put in his eſſoin on the 4th day after the return of the writ, the demandant may on the following day enter a *ne recipiatur*; if however he neglects to do ſo, the tenant may enter his eſſoin at any time after, for, it ſeems, the clerk of the eſſoins cannot refuſe to receive the eſſoin, unleſs a *ne recipiatur* be entered. But if the tenant do not appear either on the 4th day after the return of the writ, or on the adjournment day of the eſſoin, when an eſſoin has been entered, the demandant may ſue out the writ of *grand cape* againſt him, the form of which is the ſame, *mutatis mutandis*, as has been already given when we treated of the writ of dower, *ante*, note (1). and ſee alſo 3 Wilſ. 558. The return to which writ is alſo in the ſame form, *mutatis mutandis*, as the return to the *grand cape* in dower, above ſet forth, *ante*, note (1). The lands muſt be taken into the king's hands, that is, the writ muſt be executed by ſervice on the tenant, 15 days at leaſt before the return of the writ, for the ſheriff does not actually ſeize the lands and turn out the tenant, though the return imports it. Booth, 22. If the tenant do not appear on the return of the *grand cape*, and plead ſomething to excuſe his default, ſtrictly ſpeaking the land is loſt for ever; but if he do appear, the demandant may releaſe the default of not appearing at the return of the ſummons; and it is the uſual practice to do ſo. Where the *grand cape* is not returned, there may be an *alias* and *pluries*. Ib. 23.

When the tenant appears either at the return of the writ, or on the adjournment day of the eſſoin, or on the return of the *grand cape*, he may if he thinks proper, pray a view before the demandant has counted, Willes's Rep. 344. *Davis* v. *Lees*; but if he does not, then the next ſtep is *the count*, which is in this form, if the demandant counts of *his own ſeiſin*: "*Berkſhire*, to wit, *Thomas Dee* and *Ann* his wife, by *James Hore* their attorney, demand againſt *Elizabeth Druce* widow, four meſſuages, four gardens, and four acres of land with the appurtenances, in the pariſh of *Thatcham* in the county of *Berks*, which they the ſaid *Thomas* and *Ann* claim to be the right and inheritance of her the ſaid *Ann*, by writ of our ſaid lord the king of right; and whereupon they ſay that they themſelves were ſeiſed of the tenements aforeſaid with the appurtenances in their demeſne as of fee and right, in right of her the ſaid *Ann*, in the time of peace, in the time of our preſent ſovereign lord the king, to wit, within 30 years laſt paſt, (Cro. Jac. 293. *Lilburne* v. *Heron*.

S. C.

S. C. 1 Bulſt. 162. Yelv. 211.) by taking the eſplees thereof to the value, &c. and that ſuch is their right they offer, &c." but if he counts of *the ſeiſin of his anceſtor*, then the form is, "And whereupon they ſay that R. C. deceaſed, whoſe heir ſhe the ſaid *Ann* is, was ſeiſed of the tenements aforeſaid with the appurtenances in his demeſne as of fee and right, in the time of peace, in the time of the lord *George* the 2d late king of *Great Britain*, to wit, within 60 years now laſt paſt, by taking the eſplees and profits thereof to the value, &c. and from him the ſaid R. C. becauſe he died without iſſue, the right of the tenements aforeſaid with the appurtenances deſcended to E. C. his brother and heir; and from the ſaid E. C. the right of the tenements aforeſaid with the appurtenances deſcended to M. C. ſon and heir of the ſaid E. C. and from the ſaid M. C. the ſon, the right of the ſame tenements with the appurtenances deſcended to the ſaid *Ann*, daughter and heir of the ſaid E. C and wife of the ſaid *Thomas Dee*, who now dei and the ſame, and that ſuch is their right they offer, &c." It is neceſſary to ſtate in the count, that the anceſtor from whom the demandant derives title was ſeiſed of the premiſes *in right*, as well as in his demeſne as of fee. 5 Eaſt, 272. *Dowland* v. *Slade*. It is an eſtabliſhed rule, that in all real actions brought by an heir on the ſeiſin of his anceſtor, the demandant muſt ſhew *how* he is heir; it is not enough to ſay he is *heir* to ſuch a one generally, but he muſt ſet forth ſpecially in what manner and how he is heir; and that too with accuracy and correctneſs, otherwiſe it will be bad on demurrer, or after judgment for the demandant by default or on demurrer. As where in a writ of falſe judgment, on a judgment by default for the demandant in a writ of right cloſe in a court baron, the demandant in his count alleged a ſeiſin in fee in one *Thomas Gamlyn*, and that from him the right to the premiſes deſcended and came to one *William Gamlyn*, as brother and heir of the ſaid *Thomas Gamlyn*, and from the ſame *William Gamlyn* the right deſcended on one *Hannah Dowland*, as eldeſt couſin and heir of the ſaid *William Gamlyn*, that is to ſay, as eldeſt daughter and heir of one *Hannah Ball*, who was the only ſiſter *and heir* of one *Henry Gamlyn*, who was the father as well of the ſaid *Thomas Gamlyn*, (the anceſtor who died ſeiſed) as of the ſaid *William Gamlyn*. One of the errors aſſigned was in ſubſtance, that there was a repugnancy and contradiction in ſtating *Hannah Ball* to be the ſiſter *and heir* of *Henry Gamlyn*; becauſe it appeared by the count that *Henry* died, leaving his ſon *William Gamlyn* who was his *heir*, and that *William ſurvived Hannah Ball*; therefore ſhe could not by any poſſibility, according to the demandant's own ſtating, have been the heir of her brother *Henry*. It was argued that the court might reject the word *heir* as ſurpluſage, and a precedent in Herne, 502. b. *ed.* 1657. *Formedon in reverter*, was cited, where the ſame inaccuracy appeared, and no objection taken to it. But the court held the error a fatal one, and ſaid it was clear, that if the title be not accurately deduced through a ſeries of anceſtors properly deſcribed, the demandant muſt fail. 2 Boſ. and Pull. *Slade* v. *Dowland*, and this judgment was affirmed in the King's Bench, 5 Eaſt, 272. It is an eſtabliſhed rule in the Common Pleas not to ſuffer the demandant to amend the count or to diſcontinue the action. 1 Boſ. & Pull. New Rep. 64. *Charlwood* v. *Morgan*. 3 Boſ. & Pull. 453. *Dumdſay* v. *Hughes*. *Maidment* v. *Jukes*.

C. B.

C. B. E. 47 Geo. 3. So in order to maintain this action, the demandant muſt ſhew an actual ſeiſin either in himſelf or *his anceſtor* by taking the eſplees or profits of the land; therefore it is held that a *purchaſer* cannot maintain the action unleſs upon *his own ſeiſin*, and that the ſeiſin of the perſon from whom the demandant purchaſed is not of any avail. Co. Lit. 293. a. for ſeiſin in the anceſtor neceſſarily means ſeiſin in a perſon from whom there is *a deſcent*. Thus where the demandant claimed as heir to a deviſee in fee in remainder who took by purchaſe, and died before the determination of the particular eſtates for lives, upon which his remainder was expectant, ſo that he was never *ſeiſed* of the lands, and upon his death the remainder deſcended upon the demandant as his heir, who brought a writ of right; it was held that he could not ſupport the action, becauſe there was not any ſeiſin either in himſelf or his anceſtor the deviſee by taking the eſplees. 1 H. Black. Rep. 1. *Dally* v. *King*. Or the tenant may demand a view after the demandant has counted, and indeed after a general imparlance, though Dyer, 210. b. ſtates to the contrary, but the prothonotary and clerks held he might. Willes's Rep. 345. *Davis* v. *Lees*. The reaſon of which ſeems to be, that he may aſcertain the lands which are demanded, *quod certa res in judicium poſſet deduci*. Booth, 37. When a view is demanded and granted, a writ of view is ſued out by the demandant for his own expedition, inaſmuch as he is to ſhew the lands to the ſheriff to enable him to ſhew them to the tenant; and the ſheriff muſt give notice to the tenant and viewers of the time when the view is to be taken. Booth, 40. The form of demanding a view may be thus, "And the ſaid *Elizabeth Druce* by *R. C. Smith* her attorney, comes and defends her right when, &c. and demands a view of the tenements aforeſaid with the appurtenances, and ſhe has it, &c. a day is given to the ſaid parties here until, &c. and in the mean time, &c." and the writ of view may be in this form, "*George* the third, &c. We command you that without delay you cauſe *Elizabeth Druce* widow, to have a view of four meſſuages, four gardens, and four acres of land with the appurtenances in the pariſh of *Thatcham*, which *Thomas Dee* and *Ann* his wife, in our court before our juſtices at *Weſtminſter*, claim to be the right and inheritance of the ſaid *Ann*, againſt the ſaid *Elizabeth Druce*, by our writ of right, and inform four knights of thoſe who ſhall be preſent at that view, that they be before our juſtices at *Weſtminſter* (on ſuch a day) to teſtify ſuch view, and have there the names of the knights and this writ. Witneſs Sir *James Eyre*, knt. at *Weſtminſter*, &c." The return whereof may be thus; "by "virtue of this writ, I humbly certify "to the juſtices within named, that I "cauſed *Elizabeth Druce* widow, in the "writ within named, to have a view "of the tenements aforeſaid with the "appurtenances within ſpecified, in the "preſence of, A. B. &c. (naming them) "four knights of my county who were "preſent at that view; and I have ſummoned the ſaid knights to appear be"fore the juſtices within-named, at the "day and place in the ſaid writ within "ſpecified, to teſtify the ſaid view, as "within I am commanded—C. D. "ſheriff." The ſheriff may likewiſe return that, neither the tenant, nor any perſon for him, came to take the view; or that no perſon came on the part of the demandant to ſhew him the land: in the former caſe, the tenant loſes the benefit of a view, in the latter an alias

writ of view muſt be ſued out. Booth, 40. Upon the return of the writ of view, the tenant is entitled to another eſſoin, which is, as we have ſeen, in four returns both incluſive after the return, and the demandant muſt count *de novo* by a *ſimilis narratio*; ſo that in this caſe, the firſt count ſeems to be to very little purpoſe. Willes's Rep. 345. *Davis* v. *Lees*. Booth, 42. The tenant muſt appear at the day given by the eſſoin after the view, and may imparl to ſome return day or any other day in term which the court ſhall fix. The exceptions ſpecified in the before mentioned ſtatute of *Weſtminſter* 2. (13 Edw. 1.) c. 48. which ſee,) are held not to be all the caſes wherein a view ought to be denied, but they are for example's ſake: and the true rule is that a view, being a dilatory, ſhall not be granted unleſs where a view is neceſſary; whenever therefore it is plain that the tenant has ſufficient knowledge what it is that the demandant ſues for, there a view ſhall not be granted; as for inſtance, where a church is demanded, called by the name of a particular ſaint, and lying in ſuch a vill, and the tenant ſays there are two churches in that vill, and therefore demands a view, the demandant ſays by way of counterplea, that there is but one church of that name in the vill; this was holden a good counterplea, and the view was denied by the court. But it is no bar to a view to counterplead that the tenant is in actual poſſeſſion of the lands demanded, without adding, "and of no other lands in the ſame vill" &c. Willes's Rep. 347. *Davis* v. *Lees*.

If the tenant be ſeiſed only for life, he ought to pray him in the reverſion, or remainder, in tail or in fee, *in aid* to defend the inheritance of the land; and if he do not, it ſeems ſtrictly to be a forfeiture of his eſtate. The entry of the aid prayer may be thus, "And the "ſaid *Elizabeth Druce*, by *R. C. Smith* "her attorney, comes and ſays, that, "before the day of ſuing forth the "original writ of them the ſaid *Thomas* "*Dee* and *Ann* his wife, one A. M. "gent, was ſeiſed of the tenements "aforeſaid with the appurtenances in "his demeſne as of fee; and being "ſo thereof ſeiſed, he the ſaid A. M. "afterwards, to wit, on the 12th day "of *April* in the year of our lord 1779 "at the pariſh aforeſaid, duly made his "laſt will and teſtament in writing, "and thereby gave and deviſed the te-"nements aforeſaid with the appurte-"nances to the ſaid *Elizabeth* for the "term of her life, the remainder thereof "after the death of her the ſaid *Eliza-*"*beth* to H. M. and his heirs for ever; "and afterwards, and before the day "of ſuing forth the ſaid original writ "the ſaid A. M. at the pariſh afore-"ſaid died in form aforeſaid ſeiſed of "the tenements aforeſaid with the ap-"purtenances; after whoſe death ſhe "the ſaid *Elizabeth* entered into the "tenements aforeſaid with the appur-"tenances, and was ſeiſed thereof in "her demeſne as of freehold for the "term of her natural life, the remain-"der thereof after her death in form "aforeſaid belonging to the ſaid H. M. "and his heirs; and ſo ſhe the ſaid "*Elizabeth* ſays that ſhe holds, and on "the day of ſuing forth the original "writ of the ſaid *Thomas* and *Ann* did "hold, the tenements aforeſaid with the "appurtenances for the term of her "life, the remainder thereof to the ſaid "H. M. and his heirs for ever, with-"out whom ſhe the ſaid *Elizabeth* can-"not bring the tenements aforeſaid "with

" with the appurtenances into plea, nor " anſwer the ſaid *Thomas* and *Ann* " thereof, and ſhe prays aid of him the " ſaid H. M.; and it is granted to her, " &c. Therefore the ſheriff is com- " manded that he ſummon by good " ſummoners the ſaid H. M.; that he " be here from the day of *Eaſter* in " 15 days, to join together with the " ſaid *Elizabeth* in anſwering the ſaid " *Thomas* and *Ann* in the plea aforeſaid " if, &c.: the ſame day is given to the " parties aforeſaid here, &c." Co. Ent. 49. a. 182. b. 327. a. b. 341. a. Upon this demand and grant of aid, a judicial writ, called *a ſummoneas ad jungendum auxilium*, is ſued out by the *tenant*, and if the prayee, that is, the perſon whoſe aid is requeſted, make two defaults, judgment is given that the tenant ſhall anſwer to the demandant without aid. Booth, 61. 2 Boſ. & Pull. 386. *Onſlow* v. *Smith*. The *ſummoneas ad jugendum auxilium* may be in this form, " *George* the third, &c. whereas " *Thomas Dee* and *Ann* his wife, in our " court before our juſtices at *Weſtmin-* " *ſter*, demanded againſt *Elizabeth Druce* " widow, four meſſuages, four gardens, " and four acres of land with the appur- " tenances, in the pariſh of *Thatcham*, " as the right and inheritance of her " the ſaid *Ann* by our writ of right, as " it is ſaid, and the ſaid *Elizabeth* af- " terwards came into our court and " ſaid, that ſhe was ſeiſed of the tene- " ments aforeſaid with the appurte- " nances in her demeſne as of freehold " for the term of her life only, the re- " mainder thereof belonging to H. M. " and his heirs for ever, and ſhe prayed " aid of him the ſaid H. M., which " was granted to her, therefore we " command you that you ſummon by " good ſummoners the ſaid H. M. that " he be before our juſtices at *Weſtminſter* " from the day of *Eaſter* in 15 days to " anſwer together with the ſaid *Eliza-* " *beth*, the ſaid *Thomas Dee* and *Ann* " his wife in the aforeſaid plea, if he " will, and have there the ſummoners " and this writ." The prayee in aid at the return of the ſummons, or on the adjournment day of the eſſoin, which he is entitled to, may join in aid and either vouch to warranty, or plead ſomething in bar, or join the miſe upon the mere right, " whether the ſaid " *Elizabeth Druce* widow, hath greater " right to hold the tenements aforeſaid " with the appurtenances for the term " of her life, as ſhe now holds the ſame, " the reverſion thereof after the death " of her the ſaid *Elizabeth* in form afore- " ſaid belonging to the ſaid H. M. and " his heirs; or whether the ſaid *Thomas* " *Dee* and *Ann* his wife have title to " hold the ſaid tenements with the ap- " purtenances as they have above de- " manded the ſame, and the ſaid *Thomas* " *Dee* and *Ann* his wife likewiſe." Co. Ent. 182, 183. The judgment when the prayee in aid makes default upon the return of the *alias* ſummons *ad jungen- dum auxilium*, is entered in this manner, " At which day before our lord the " king at *Weſtminſter* come as well the " ſaid *Thomas* and *Ann*, as the ſaid " *Elizabeth* by their ſaid attornies; and " the ſaid H. M. (the prayee in aid) " though ſummoned as before, and " ſolemnly called, came not, therefore " it is conſidered that the ſaid *Elizabeth* " anſwer the ſaid *Thomas* and *Ann* the " ſaid count without the ſaid H. M." Raſt. 27. a. As aid prayer is a dila- tory plea, it muſt be verified by affidavit under the ſtatute 4 *Ann.* c. 16. ſ. 11.

which

which extends to all dilatory pleas, as well in criminal as civil caſes; and if it be pleaded in another term after a general imparlance, it is bad and may be demurred to; and on ſuch demurrer the court will give judgment that the tenant anſwer alone. 2 Bof & Pull. 384. *Onſlow* v. *Smith*. The demandant may counterplead the truth of the aid prayer, as that the prayee has nothing in the reverſion or remainder, or that the prayee did not demiſe the land to the tenant. Raſt 27. a. There are two ſorts of trial now in uſe in this action, 1. by the grand aſſize, and 2. by a common jury of twelve upon a collateral point.

1. The grand aſſize is a jury of twelve joined to four knights, who chooſe the twelve, to try the mere right between the demandant and the tenant, and it is called *joining the miſe upon the mere right*, which is equivalent to joining iſſue in other actions. The reaſon of its being called the mere right ſeems to be, becauſe the *right of property* to the land is only put in iſſue, without any regard to the *right of poſſeſſion*; for the tenant may poſſibly have come unlawfully to the poſſeſſion, and yet have a good right to the land, and *vice verſâ*: and the grand aſſize muſt find according to the *right of property*. Booth, 95. The manner of the tenant's putting himſelf upon the grand aſſize may be ſeen in 3 Wilſ. 561. *Tyſſen* v. *Clark*. When the miſe is joined, the firſt proceſs is a writ of ſummons of four knights to appear and chooſe the grand aſſize. See the form of the writ and return. 3 Wilſ. 559, 560. This writ, if the action is to be tried at the aſſizes, muſt be in the alternative, to ſummon the four knights into bank, *or* at the aſſizes, if the judges come thither before the day in bank, in this manner; "that they be before our juſtices on the morrow *of All Soul's, or* before our juſtices aſſigned to take the aſſizes in and for your country, if they ſhall firſt come on *Monday* the firſt day of *July* next at *Abingdon* in your county, according to the forms of the ſtatute in ſuch caſe made and provided:" for if the writ be to ſummon them into bank with a clauſe of *niſi prius* therein, namely, "*unleſs the juſtices of aſſize ſhall firſt come on, &c. at Abingdon to hold the aſſizes*," it is bad and will be quaſhed; becauſe that would only be a conditional writ to ſummon the knights into bank unleſs the juſtices of aſſize come to *Abingdon* before the day in bank; but if they *do* come to *Abingdon*, there is no precept or command to the ſheriff to ſummon the knights to make an election of other jurors there, or commiſſion to the judges to ſwear them. 2 Bl. Rep. 1261. *Luke* v. *Harris*; and it ſeems the ſheriff ſhould return that he had ſummoned them in the alternative according to the exigence of the writ. After the knights have appeared and choſen of themſelves and 20 others a jury, the next ſtep is the *venire facias*, which, it ſeems, is to return the jury into bank as in other actions, and the demandant may then ſue out a *habeas corpus recogniorum* in the alternative like the writ of ſummons. If the four knights do not appear on the firſt writ of ſummons, the demandant may ſue out an *alias* or *pluries* ſummons; or he may have a *habeas corpora quatuor militum*, in the alternative, as in the writ of ſummons. 2 Townſ. Judg. 115. Booth, 102. It has been doubted whether a writ of right can be tried at the aſſizes,

or any where elſe but at bar. 2 Black. Rep. 1261. 1293. *Luke* v. *Harris*. But beſides that it is the conſtant practice to try writs of right at the aſſizes, it ſeems to me that it is taken for granted in ſome of the beſt authorities, that writs of right may be tried at *niſi prius*, 12 H. 7. 10. Bro. *Droit de recto*, 28. S. C. Bro. *niſi prius*. 16. 17. 24. Jenk. Cent. 38.

If there be not four knights in the county the ſheriff may return others. When the four knights appear, it is ſaid by Lord *Coke* that they cannot be challenged. Co. Lit. 294. a. but are ſworn lawfully and truly to chooſe 20 knights girt with ſwords who beſt know and will declare or ſay the truth between the parties; and the demandant and tenant may be ordered to go with the four knights to make their challenges before them to thoſe that ſhall be choſen by them; for after the panel made by the four knights, no challenge can be made either to the array or to the polls. 29 Edw. 3. 2. b. 7 H. 4. 20. a. S. C. abridged. Bro. *Droit*, 6. 1 Leon. 303. *Wigot and Clark's Caſe*. Lit. ſ. 514. Bro. *Droit*, 12. It is ſaid however 15 Edw. 4. 1. by *Choke* and *Littleton* juſtices, againſt the opinion of Co. Lit. 294. a. that the four knights may likewiſe be challenged when they and the parties are chooſing the other knights, and that if one be challenged it is to be tried by the other three, and if two be challenged by the other two; and if three be challenged a new writ muſt iſſue to chooſe four other knights, for no challenge can be tried by leſs than two. When the recognitors are called and appear, 16 are ſworn: the form of the oath is in Lit. ſect. 514. 3 Wilſ. 541. *Tyſſen* v. *Clarke*. The tenant firſt begins his caſe, becauſe the miſe is firſt prayed for and joined by him. 3 Leon. 162. *Heidon* and *Ibgrave*'s caſe. S. C. 1. And. 148. Moor, 762. *Andrews* v. *Lord Cromwell*. Dyer, 247. b. pl. 75. However if the tenant tenders the demy-mark in court at the time of the trial, the demandant muſt then begin; ſo held by Mr. Juſtice *Heath* in *Throgmorton*, bart. v. *Broke*, *Gloceſter* ſummer aſſizes 1800, who cited the ſaid caſe in Moor, 762; but it ſeems queſtionable whether that caſe warrants it; theſe three points were ruled by the court: 1. That the demy-mark ought to be tendered at the joining of the miſe, yet the judges now take it at the appearance of the jury. 2. *The tenant* ought to begin in the giving of evidence. 3. The jury cannot find a ſpecial verdict. It is ſaid in Bro. *Droit*. 48. that nothing can be pleaded in this action but a collateral warranty, and every thing elſe may be given in evidence upon the miſe joined. Booth, 98. 112. And the court of C. P. ſeem to have been of the ſame opinion in *Tyſſen* v. *Clarke*. 3 Wilſ. 420. The form of the judgment when there is a verdict for the demandant after the miſe joined is in 3 Wilſ. 563. So if the tenant make default or confeſs the action after the miſe joined, *final judgment* is given, though not until after a *petit cape* is firſt ſued out and a default thereon, according to 5 Rep. 86. a. *Penryn*'s caſe. Booth, 101. but in 1 Bulſt. 161, 162. *Herne* v. *Lilborne*, it is held, that final judgment is given *without any petit cape*, againſt the reſolution in *Penryn*'s caſe, and ſo is Co. Lit. 295. 1 Show. 20. 65. *Sleigh* v. *Chetham*. F. N. B. 11. 12. 7th edit. But if the verdict be for the tenant, or the demandant be nonſuited after the miſe joined, the judgment is in this form; "Therefore it is conſidered

"that

" that the ſaid *Thomas Dee* and *Ann* his " wife take nothing by their ſaid writ, " but he in mercy for their falſe claim " thereof, and that the ſaid *Elizabeth* " *Druce*, widow, go thereof without " day, &c. and that ſhe the ſaid *Eliza-* " *beth Druce* hold the tenements afore- " ſaid with the appurtenances to her " and her heirs, quit of the ſaid *Thomas* " *Dee* and *Ann*, his wife, and the heirs of " the ſaid *Ann*, for ever." 2d Townſ. Judg. 115.

If a writ of *quod ei deforceat*, in the nature of a writ of right, be brought in the courts of great ſeſſions in *Wales*, purſuant to the ſtatute of *Rutland*, (12 Edw. 1.) the miſe joined upon the mere right is ordained by that ſtatute to be tried by a common jury of 12 men, and therefore the common jury proceſs of a *venire facias* is there uſed; ſtill however it is held, that final judgment ſhall be given as in writs of right in *England*; for though the manner of the trial is altered by the ſtatute, yet the judgment which belongs to ſuch action remains as it was before. 5 Rep. 85. b. 86. *Penryn*'s caſe. 2. Although it be ſaid that every thing but a collateral warranty may be given in evidence upon the miſe joined upon the mere right, yet the tenant may alſo plead ſeveral other matters ſpecially; as that the tenant levied a fine with proclamations, or that the anceſtor of the demandant made his will, and deviſed away the lands; or that the tenant recovered the ſame premiſes from the demandant in a writ of right by the verdict of the grand aſſize, and had final judgment. And the iſſues upon theſe pleas are to be tried by a common jury of 12 men as other iſſues are. Bro. *Droit*, 30. 42, 43. Booth, 113. 3 Wilſ. 420. It is ſaid that the ſafeſt way is to join the miſe on the mere right and give the ſpecial matter in evidence; at the ſame time however it is obſerved, that it is frequently the leaſt dilatory and vexatious mode for the tenant, where the matter in bar is clear, *to plead* it. Booth, 115. At the common law there were no coſts in any real action, and as no damages are recovered, neither the demandant nor tenant is intitled to coſts in this action by the ſtatute of *Gloceſter* or any other ſtatute, 10 Rep. 116. *Pilfold*'s caſe.

William, the heir of William, againſt Gwyn.

Eaſter, 20th of King *Charles* the 2d. Roll. 260.

S. C. 1 Vent. 60. 2 Keb. 450. 551. 605. If a *grand cape* be awarded againſt the tenant upon his appearance, and default after *in the ſame term*, and on the return of the *grand cape* judgment be given for the demandant, it is not aſſignable for error, becauſe it was to the tenant's advantage.

ERROR brought by *William*, as heir to *William* his father, againſt *Gwyn*, to reverſe a judgment in dower in the great ſeſſions of the county of *Brecon*, in *Wales*, where *Gwyn* was demandant in dower (5) againſt *William* the father, who appeared in chief upon the ſummons, and the demandant made her demand, and the (*a*) tenant ſaid nothing, but ſuffered judgment for want of an anſwer, and the court thereupon awarded a *grand cape*, and on the return of it judgment was given for the demandant to recover her dower, and ſhe had execution; after which the tenant died, and the plaintiff, as ſon and heir (6) of the tenant, brought a writ of error, and aſſigned the general error.

And *Saunders* for the plaintiff in error, aſſigned an error at the bar, upon which he inſiſted, namely, that it appeared by the

[(*a*) 46]

(5) If the huſband at any time during the coverture is ſeiſed in fee ſimple, fee tail general, or as heir in ſpecial tail, upon his death his wife is intitled by the common law to dower, provided ſhe is then 9 years old, whether ſhe has iſſue by him or not. Lit. ſect 36. The reaſon of ſpecifying the eſtates above mentioned is, becauſe her iſſue may in any of thoſe caſes inherit as heir; the rule being, that the wife is intitled to be endowed of ſuch tenements only as her iſſue may inherit as heir to her huſband; for if her iſſue cannot inherit, the wife is not intitled to dower; as where the huſband is ſeiſed of an eſtate to him and the heirs of his body by a former wife, his ſecond wife has no right to dower. Lit. ſ. 53. So the wife of a jointenant in fee is not intitled to dower, becauſe the eſtate upon his death does not deſcend to his heir but ſurvives. Co. Lit. 31. b. The wife is intitled to dower although the huſband had only a ſeiſin *in law*; as where he dies before entry, ſtill his wife ſhall be endowed; and the reaſon aſſigned is, becauſe it is not in the wife's power to reduce her huſband's eſtate into his actual ſeiſin, as he may do his wife's: and therefore it is held that he ſhall not be tenant by the curteſy unleſs there has been an actual ſeiſin by him or his wife. Co. Lit. 31. a. But ſhe ſhall not be endowed, where the ſeiſin of her huſband is defeated; as if three acres of land deſcend from A. to B. and A.'s wife recover dower of one acre *againſt B.* who afterwards dies, his wife ſhall be endowed only of the remain-

the record that the tenant had appeared in chief, and the demandant had counted againſt him, and he ſuffered judgment to paſs by *nihil dicit*, and yet the court awarded a *grand cape*, whereas a peremptory judgment ought to have been given upon the *nihil dicit* without any award of a *grand* or *petit cape*.

WILLIAM, the heir of WILLIAM, *v.* GWYN.

For

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remaining two acres, although A.'s wife dies in her life-time, becauſe the ſeiſin of B. was defeated; but if B. had died and his wife were endowed of the three acres, and A.'s wife recovered *againſt her*, and died, B.'s wife ſhall enter again into the one acre. Co. Lit. 31. a. b. It is not neceſſary that the huſband ſhould *die ſeiſed*; if he alien the land, it is ſubject to her dower, for her title is conſummate by the marriage and over-reaches the alienation, Co. Lit. 32. a. It is however neceſſary that the marriage do continue: for if the huſband and wife are divorced *a vinculo matrimonii*, the dower ceaſes; but if they are divorced only *a menſa et thoro*, as for adultery, &c. ſhe is ſtill intitled to dower, Co. Lit. 32. a. But a wife is not intitled to be endowed of lands which her huſband was ſeiſed of for an inſtant, or as an inſtrument; as if *ceſtui que uſe* after ſtatute 1 R. 3. c. 1. and before ſtatute 27 H. 8. c. 10. had made a feoffment, his wife ſhould not be endowed, Co. Lit. 31. b. So if lands at this day be conveyed to B. and his heirs to the uſe of C. and his heirs, which is a uſe executed by the ſtatute 27 H. 8. c. 10. the wife of the feoffee or releſſee has not title of dower. It is alſo ſettled that there is no dower of *a truſt eſtate*, or *of an equity of redemption in fee*. There was no dower of an *uſe* before the ſtatute, it being entirely a legal demand, and there is no difference between a truſt now and an uſe before the ſtatute, Caſes Temp. Talb. 138. *Attorney-general* v. *Scot.* 3 P. Will. 232—235. *Chaplin* v. *Chaplin.* 2 Atk. 525. *Godwin* v. *Winſmore.* 1 Bro. 326. *Dixon* v. *Saville.* Women were not dowable of tithes till the ſtatute 32 H. 8. c. 7. ſ. 7.: for before that time tithes were not a lay fee, but now by the expreſs words of the ſtatute a wife is intitled to be endowed of them, Co. Lit. 32. a. 159. a. 11. Rep. 25. b. *Harpur's* caſe. Nor are they of a copyhold eſtate unleſs by cuſtom; but when it exiſts, it is held that the wife ſhall have the benefit of the laws which are made for the recovery of dower in caſes of freehold, and therefore ſhall recover damages within the ſtatute of Merton. Co. Lit. 32. a. Moor, 410. pl. 559. *Shaw* v. *Thompſon*, 4 Rep. 22. a. But if ſhe be not intitled to dower by cuſtom, and yet bring a writ of dower, the heir may plead that her huſband *ne unques ſeiſique dower*, and give the ſpecial matter in evidence, 2 Bac. Abr. 123. So a wife who is an alien, whether friend or enemy, ſhall not be endowed, Co. Lit. 31. b. But it is ſaid that if ſhe be married by the king's ſpecial licence ſhe is intitled to her dower, 1 Roll. Abr. 675. Hargrave, Co. Lit. 31. b. n. (9).

(6) No perſon can bring a writ of error unleſs he is *party* or privy to the record

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On an appearance in chief and default afterwards in the ſame term no petit cape ought to be awarded, but judgment of ſeiſin ſhould be given: and ſo on a *nihil dicit* recorded.

A grand cape does not lie but on a default of the tenant *before* appearance in chief, for *after* ſuch appearance a *petit cape* lies if the tenant makes default *in another term.*

For upon an appearance, and default afterwards *in the ſame* term, no petit cape ought to be awarded, but judgment of *ſeiſin ſhould be given, and ſo it is on a nihil dicit recorded, as appears by all the books, and the conſtant practice.* 38 Edw. 3. 13. b. 17 H. 4. 19. Coke's Entries, 171. Plow. Comm. 41. Alſo a *grand cape* does not lie, but when the tenant makes default *before* his appearance in chief; for *after* an appearance in chief a *petit cape* lies, if the tenant make default in *any other* term after his appearance; but if he make default in the *ſame* term in which he appears, a peremptory judgment ſhall be given, namely, for the demandant to recover ſeiſin, as appears by the books above cited, and according to the conſtant practice; and beſides, the words of the *grand cape* are that the tenant ſhall ſhew cauſe "*wherefore* "*he was not in our court at ſuch a day* paſt *as he was ſummoned*:" and ſo it is in the caſe at bar, which is abſurd and repugnant; becauſe it appears by the body of the record that

record, or is prejudiced by the judgment; the rule upon the ſubject being, that a writ of error can only be brought by him who would have had the thing, if the erroneous judgment had not been given, 1 Roll. Abr. 747. (K.) pl. 1. Dy. 90. a. 2 Bac. Abr. 195. Therefore in a plea of land againſt the tenant, *the heir to the land* muſt in caſe of the tenant's death bring error; as if one who has lands on the part of his mother, loſes them by an erroneous judgment and dies, his heir on the part of his mother only can bring error. 1 Leon. 261. *Henningham* and *Windham*'s caſe, 8. C. Owen, 68. So the younger ſon who is intitled by the cuſtom of borough-engliſh muſt bring error, and not the heir at common law, for the remedy deſcends with the lann. Ibid. So error upon a judgment againſt tenant in ſpecial tail muſt be brought by the heir to the ſpecial tail. F. N. B. 50. 7th edit. 1 Roll. Abr. 747, (K.) pl. 2. So at common law if judgment had been obtained againſt leſſee for life, the reverſioner or remainder man, if immediate, might bring error after his death; and now by ſtatute 9 R. 2. c. 3. may during the continuance of the eſtate for life. 3 Rep. 4. a. *Marquis of Wincheſter*'s caſe. 5 Mod. 397. *Anon.* So ſince the *ſtatute de donis*, error may be brought by him who has a remainder or reverſion immediately expectant on an eſtate tail. 3 Rep. 4. a. It is not neceſſary to ſhew either in the writ of error, or *ſcire facias*, how the plaintiff in error is heir, unleſs in ſome particular caſes, as where a ſpecial heir in tail or heir in remainder brings error; for there it is held that

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that the tenant *had appeared in chief on the ſame day* that the *grand cape* ſuppoſes *that he was not in our court*, and therefore the writ of *grand cape* is contrary to the record; and for this error he prayed that the judgment ſhould be reverſed.

Jones for the defendant in error, and all the court agreed, that the great ſeſſions might have given judgment of ſeiſin without awarding any *grand* or *petit cape*; but *Jones* ſaid, that the plaintiff cannot aſſign it for error, becauſe it is only to the diſadvantage and delay of the demandant, and not at all prejudicial or hurtful to the tenant, and therefore not to be alleged as error for him, inaſmuch as it is not to the "*great damage of the plaintiff*," as the writ of error ſuppoſes. And for that he cited the books of 8 H. 4. 2. (*b*) b. F. N. B. 21. f. 5 Rep. 39. b. (*c*) (7). And though it was objected on the other ſide that it was an error in *the judgment itſelf*, and might therefore be well aſſigned for error, notwithſtanding it was to the advantage (*a*) of the plaintiff in error; as in 8 Rep. 59. *Beecher*'s caſe, *a miſericordia* entered in a judgment inſtead of a *capiatur*, is aſſignable for error, though it be for the benefit of the party againſt whom the judgment is given, becauſe it is error in the judgment itſelf (8). But the whole court, without any difficulty, affirmed the judgment for the reaſon given by *Jones*, without taking any notice of this objection.

A man ſhall not reverſe judgment by error, unleſs he can ſhew that the error is to his diſadvantage.

(*b*) Fitz. Error, 92.
(*c*) Tey's caſe. S. P. 8 Rep. 59. a. Beecher's caſe.

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he muſt ſhew ſpecially how he is heir, or has the remainder. Cro. Jac. 160. *Champernow* v. *Godolphin*. It ſeems that error upon an attainder for treaſon or felony may be brought either by the heir or the executor. 1 Leon. 325. *Marſh*'s caſe. 1 Show. 13. *The King* v. *Ayloffe*. S. C. 1 Salk. 295. But if there be judgment againſt the *principal*, and alſo againſt the *bail*, the principal cannot have error on the judgment againſt the bail, nor the bail on the judgment againſt the principal, nor can they join in a writ of error any more than tenant for life, and he in remainder can join, for they are ſeveral judgments and affect diſtinct perſons. 1 Roll. Abr. 748, 749. Cro. Car. 408. *Buſhell* v. *Talle*. Ibid. 481. *South* v. *Gryffith*. S. C. *Sir W. Jones*, 396. Cro. Car. 561. *Anon*. 1 Lev. 137. *Atherton* v. *Hole*.

(7) So giving oyer where it ought not to be allowed is not aſſignable by the defendant for error, being to his advantage, though the denial of it, where it ought to be allowed, is error. 2 Ld. Raym. 970. *Longueville* v. *Inhabitants of Thiſtleworth*.

(8) Where the error is *by default of*

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the court, it may be aſſigned by him who is benefited by it; as where in debt it is found that the defendant owes the plaintiff 5l. and the jury aſſeſs damages to 2d. and coſts 2d. and the judgment is, that the plaintiff ſhall recover his debt, and damages aforeſaid to 2d. and no judgment is given for the coſts, the defendant may aſſign this omiſſion for error though it be to his advantage, 1 Roll. Abr. 759. pl. 1, 2, 3, 4. 760. pl. 5. S. P. 4 Leon. 61. *Buſhey* v. *Milfield*. Jenk. 211. pl. 48. But if the default be in *the verdict*, to the advantage of the defendant, he cannot aſſign it for error. 1 Roll. Abr. 760. pl 6. And now by ſtatute 16 and 17 Car. 2. c. 8. it is enacted, that no judgment after verdict, confeſſion by *cognovit actionem*, or *relictâ verificatione*, ſhall be reverſed for want of *miſericordia* or *capiatur*, or by reaſon that a *capiatur* is entered for a *miſericordia*, or a *miſericordia* is entered where a *capiatur* ought to have been entered; nor for that *ideo conceſſum eſt per curiam* is entered for *ideo conſideratum eſt per curiam*; nor for that the increaſe of coſts, after a verdict in any action, or upon a nonſuit in replevin, are not entered to be at the requeſt of the party for whom the judgment is given; nor by reaſon that the coſts in any judgment whatſoever are not entered to be by conſent of the plaintiff; but that all ſuch omiſſions, variances, defects, *and all other matters of like nature*, not being againſt the right of the matter of the ſuit, nor whereby the iſſue or trial are altered, ſhall be amended by the juſtices, or other judges of the courts where ſuch judgments are or ſhall be given, or whereunto the record is or ſhall be removed by writ of error. See Willes's Rep. 600, 601. *Middleton* v. *Wynne*.

Caſe 5.

Wilbraham againſt Snow.

Hil. 20 & 21 of King *Charles* the 2d. Roll. 1540.

S. C. 1 Lev. 282. 1 Sid. 438. 1 Vent. 52. 1 Mod 30. 2 Keb. 588. A ſheriff may maintain an action of treſpaſs or trover againſt any perſon who takes away goods which he has ſeized in execution. S. P. 6 Mod. 291.

TROVER, upon ſpecial verdict, the caſe was this; the plaintiff, being ſheriff, ſeized goods in execution by virtue of the writ of *fieri facias*; and afterwards, and before they were ſold, the defendant took and carried them away, and converted them to his own uſe; for which the plaintiff brought his action. And on the firſt argument it was adjudged that the action well lies; and that the plaintiff, being ſheriff, has ſuch a property in the goods, by ſeizing them in execution, that he may maintain an action of treſpaſs or

trover

trover at his election (1); and judgment was given for the plaintiff *nisi*, &c. but it was not moved afterwards. *Sympson* for the plaintiff; *Winnington* for the defendant. See 34 H. 6. 36 (2) a. and the case of *Ayre* v. *Aden* in Moor, 737. Cro. Jac. 73. Dalt. Office of Sheriffs, case 2. fol. 19, which case was

(1) S. P. 6 Mod. 292. *Clerk* v. *Withers*: for he is answerable to the plaintiff to the value of the goods taken under the writ of *fieri facias*; and the defendant is discharged from the judgment and all further execution, if the sheriff has taken goods to the amount of the debt, although he does not satisfy the plaintiff. 2 Roll. Rep. 57. *Slie* v. *Finch*. 6 Mod. 292. 299. *Clerk* v. *Withers*. S. C. 1 Salk. 323. or has not returned the writ; and it will be a bar to a *scire facias* on the judgment. Cro. Eliz. 237. *Mountney* v. *Andrews*. S. C. 4 Leon. 150. S. P. 2 Ld. Raym. 1072. *Clerk* v. *Withers*. But to prevent improper conduct in the sheriff, it will be prudent for the plaintiff, or defendant, (for either may do it,) to rule him to return the writ, if he has not already done so. And now in practice it has become a frequent action; thus (among many others which might be mentioned) the case of *Bamford* v. *Baron*, cited in 2 Term Rep. 594. *Edwards* v. *Harben*, note (*a*), was an action of *trover* by the late sheriff of the county of L., against the defendants, who had seized the goods in question, which formerly belonged to one H., after they had been taken in execution at the suit of a creditor, *to whom the sheriff had paid the value*, and no objection taken to the form of the action. In that case it was stated, that the sheriff had paid the value, but that does not appear to be necessary; for if he had *not* paid the value, it seems from the determination in the principal case, he might have maintained the action, because by the seizure he acquired a special property in the goods, and was *responsible* to the plaintiff for the value of them.

In order to maintain *trover*, it is necessary that the plaintiff should have either an absolute, or a special property in the goods which are the subject of the action. 7 Term Rep. 398. *Webb* v. *Fox*. per *Lawrence* J. He who has an absolute or general property may support this action, although he has never had the actual possession; for it is a rule of law, that the *property* of personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover at his election against any stranger who takes them away. Thus if A. in *London* gives J. S. his goods at *York*, and another takes them away before J. S. obtains actual possession, J. S. may maintain trover or trespass for them. Bro. *Trespass*, 303. Latch. 214. *Hudson* v. *Hudson*. So where a man has wreck by prescription or grant, and another takes it away, he may bring trover or trespass before seizure. F. N. B. 207. D. 7th edit. 2 Wilf. 23. *Biddulph* v. *Arthur*. And upon this principle it was held, on the trial of an ejectment for a mine, that recovery *in trover*, for a parcel of lead dug out of the mine, was no evidence of the plaintiff's *possession* of the mine.

Bull.

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was adjudged as reported in thoſe books, againſt the report of Yelverton, 44. and the Roll is in *Eaſter* 44 Eliz. Rol. 318 (3).

Bull. N. P. 33. Alſo where A. is indebted to C. and B. to A. and it is agreed between them, that B. ſhall give goods in his poſſeſſion, which were the goods of A. to C. in ſatisfaction of A.'s debt, if B. converts them, C. may maintain trover againſt him although he never had poſſeſſion, for by the agreement, the right of property was in him, and the converſion is a wrong to him. Bull. N. P. 35. So where an executor declares upon the *poſſeſſion* of his teſtator, and of a converſion by the defendant after his death, it is held to be ſufficient, becauſe the property is veſted in the executor, and that draws after it the poſſeſſion in law. Latch. 214. 7 Term Rep. 13. *Gordon* v. *Harper*. *per Lawrence* juſtice. In like manner a man who has delivered goods to a carrier, or other bailee, and ſo parted with the actual poſſeſſion, may maintain trover for a converſion by a ſtranger, for the owner has ſtill poſſeſſion in law againſt a wrong-doer, and the carrier, or other bailee, is no more than his ſervant. 7 Term Rep. 12. *Gordon* v. *Harper*. But it is ſaid, that if the bailee, or other perſon who has only a ſpecial property, ſells and *delivers* the goods to another as his own *bonâ fide*, and without notice, the general owner cannot maintain this or any other action againſt the vendee, becauſe by ſuch a ſale by a perſon who has a ſpecial property in, and poſſeſſion in fact of the goods, the property of the general owner is altered. Bro. *Treſpaſs*, 216. 295. However there muſt exiſt a *right of poſſeſſion*, as well as of property, to ſupport this action; therefore, where a man let a houſe and furniture for a term, and the furniture was wrongfully taken in execution pending the term, it was holden, that the leſſor could not maintain trover, becauſe during the term he had parted with *the right of poſſeſſion*. 7 Term Rep. 9. *Gordon* v. *Harper*.

Or, 2dly, he muſt have a ſpecial property in the goods; thus a carrier may maintain trover againſt a ſtranger who takes the goods out of his poſſeſſion. 1 Roll. Abr. 4. (I.) pl. 1. 1 Ld. Raym. 276. *Arnold* v. *Jefferſon*. Bull. N. P. 33. So may a factor or other conſignee, or pawnee, or truſtee; ſo if a houſe be blown down and a ſtranger take away the timber, the leſſee for life may bring trover, for he has a ſpecial property to make uſe of it for the purpoſe of rebuilding, although the general property is in the owner. Bull. N P. 33. So the lord of a manor may before the expiration of a year and a day, and even before ſeizure, bring trover againſt a ſtranger who takes away an eſtray from off his manor. Ibid. So if a man lends his cattle to J. S. to plough his land, and a ſtranger takes them away, J. S. may maintain trover or treſpaſs againſt him. Bro. *Treſpaſs*, 92. The agiſter of cattle may alſo maintain trover againſt a ſtranger who takes them away. Bro. *Treſpaſs*, 67. So churchwardens may bring trover for the goods of the church taken away either in their own time, or in that of their predeceſſors, for the churchwardens of the preceding year cannot

cannot maintain an action after the expiration of their year. 11 H. 4. 12. a. Com. Dig. *Eglise* (F. 3.) F. N. B. 208. K. 7th edit. Bro. *Garden d'esglise* 4. 6. 7. 2 P. Will. 126. *Attorney-General* v. *Ruper*. 2 Str. 852. *Dent* v. *Prudence*. If the action be brought for a conversion in their own time, the declaration, it is said, may conclude either *ad damnum ipsorum*, or *parochianorum*, at their election; but if the successors bring the action for a conversion in the time of their predecessors, the declaration must of necessity conclude *ad damnum parochianorum*. Cro. Eliz. 145. 179. *Hadman* v. *Ringwood*; but a bailee must conclude "to his *own damage*," for he recovers to his own use, and is chargeable over to the bailor. Bro. *Garden d'esglise* 7.

So possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrong-doer; for possession is *primâ facie* evidence of property. 1 Salk. 290. *Blackham's* case. As in trover for certain loads of wood, the case was, that Sir T. P. having a large wood sold to one C. and his assigns, as many trees as would make 600 cords of wood to be taken by the assignment of Sir T. C. assigns over his interest to the plaintiff; afterwards Sir T. granted to the defendant so much of his wood as would make 4000 cords to be taken at the defendant's election: afterwards the plaintiff by the assignment of Sir T. cut down the trees in question to make 600 cords, and the defendant claiming them by virtue of his grant took them; and it was found that there was sufficient wood left for the defendant; it was held that the action was maintainable, because by cutting down the trees, *the plaintiff had possession and a good title*, against the defendant and every stranger; and being cut down, the defendant could not lawfully take them; and even supposing the plaintiff had not a good title, yet *having possession* of the trees was sufficient. Cro. Eliz. 819. *Basset* v. *Maynard*. S. C. 5 Rep. 24 b. Moor, 691, 692. So in trover for a quantity of rushes, it was proved that the plaintiff, being possessed of a cottage at T. and an inhabitant there, and as such claiming a right to cut rushes upon T. common for his own use, cut down about 5 or 6 load of rushes, which the defendant carried away; the judge, being of opinion that the evidence was insufficient, nonsuited the plaintiff; but a rule having been obtained why there should not be a new trial, it was insisted for the plaintiff that this was such evidence of property in the plaintiff and of a conversion by the defendants, who appeared to be mere strangers, as made it necessary for them, if they had any defence, to have gone into it at the trial, so that the whole might have been left to the jury; and although the plaintiff had not a lawful right to cut rushes, still as he claimed such right, and asserted it by cutting them, and thereby gaining possession, he acquired a property sufficient to put the defendants upon shewing they had a better property in them; to which the court agreed, and said it was sufficient evidence against the defendants who had neither by evidence or pleading shewn any right or title whatever to the rushes, and must therefore be taken to be mere strangers and wrong-doers; that indeed a person who has no colour of right to cut down rushes, or take any other thing, cannot by cutting the rushes or taking the thing without any colour of right acquire a property: but in the case at bar the plaintiff proved he had a right

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to cut the ruſhes, and did cut them, and therefore he gained a property in them. 3 Wilſ. 332. *Rackham* v. *Jeſup*. So where, in treſpaſs for taking and diſperſing a load of fern aſhes, the defendant pleaded that he was an occupier of land in A. the tenants whereof had a right of common, and of cutting fern in a particular place in which the plaintiff wrongfully cut fern, and burnt it, whereupon the defendant ſcattered it about as he well might; upon demurrer to the plea, the court held that if the plaintiff did him any damage he might have brought his action, but after the plaintiff had burnt the fern, and thereby acquired *poſſeſſion* of it, a commoner had no right to come and diſperſe it. 2 Str. 777. *Woadſon* v. *Nawton*. It is true this was an action of *treſpaſs*, but it ſeems unqueſtionable that trover would alſo have lain, and ſo was the opinion of the court of Common Pleas in the above cited caſe of *Rackham* v. *Jeſup*.

There may alſo be a ſpecial property ariſing ſimply out of a lawful poſſeſſion, but which ceaſes when the true owner appears; as where the plaintiff, being a chimney ſweeper's boy, found a jewel and carried it to the ſhop of the defendant, who was a goldſmith, to know what it was, and delivered it into the hands of his apprentice, who, under pretence of weighing it, took out the ſtones, and called to the maſter to let him know it came to three halfpence, the maſter offered the boy the money, but he refuſed to take it, and inſiſted on having the thing again; whereupon the apprentice delivered him back the ſocket without the ſtones; and in trover againſt the maſter it was ruled, 1. That though the finder of a jewel does not acquire an abſolute property, yet he has ſuch a property as will enable him to keep it againſt all but the rightful owner, and conſequently may maintain trover. 2. That the action well lay againſt the maſter who gave a credit to his apprentice and is anſwerable for his neglect. 1 Str. 505. *Armory* v. *Delamirie*, in *Middleſex*, *coram Pratt* C. J. In like manner a perſon who has only a *ſpecial property* may in ſome caſes maintain trover, although he has never had *actual poſſeſſion*; thus, a factor to whom goods have been conſigned, but which he has never received, may bring this action. 1 Boſ. and Pull. 44. *Fowler* v. *Down*. However without ſuch abſolute or ſpecial property this action cannot, as we have already noticed, be maintained; therefore tenant in tail, expectant on the determination of an eſtate for life *without impeachment of waſte*, cannot bring trover for timber which grew upon, and was ſevered from, the eſtate; for ſuch a tenant for life has a right to the trees the moment they are cut down. 1 Term Rep. 55. *Pyne* v. *Dor*. And the plaintiff muſt not only prove that the goods, which are the ſubject of the action, are his property, but alſo *that they were ſo when they were converted* by the defendant. As where goods ſtolen were purchaſed in market-overt, *and ſold by the purchaſer before the felon was convicted*, it was decided that the owner of the goods proſecuting to conviction could not maintain trover againſt the purchaſer under the ſtatute 21 H. 8. c. 11. which gives a reſtitution to the owner who proſecutes the felon to conviction, although he gave the purchaſer notice of the robbery while they were in his poſſeſſion: for the property, being altered by the ſale in market-overt, was

not

not reveſted in the owner until the conviction of the felon, but the defendant had parted with the poſſeſſion before that time, and therefore could not be ſaid to have converted the *plaintiff*'s goods. 2 Term Rep. 750. *Horwood* v. *Smith*. And the action may in moſt caſes be brought either by the general or ſpecial owner of the goods for a converſion thereof by a ſtranger, and judgment obtained by one is a good bar to the action of the other. Bro. *Treſpaſs*, 67. 2 Roll. Abr. 569. (P.)

Another ingredient of this action is that there ſhould he *a converſion* by the defendant; as to which, it is a common learning, that where the goods came into the defendant's poſſeſſion by delivery or finding, the plaintiff muſt demand them, and the defendant refuſe to deliver them up, in order to conſtitute a converſion, 1 Sid. 264. *Bruen* v. *Roe*. Bull. N. P. 44. But ſuch demand and refuſal is only *evidence* of a converſion, and therefore if it be found in a ſpecial verdict that the plaintiff *demanded* goods of the defendant and *he refuſed*, the court cannot adjudge it a converſion, 10 Rep. 56. b. 57. a. *Chancellor of Oxford's* caſe. 2 Mod. 244. *Mires* v. *Solebay*, Bull. N. P. 44. But a demand and refuſal is no evidence of a converſion, where it is apparent that the defendant has made no converſion; as where the defendant cut down trees and left them lying in the place where they were felled: for he cannot be ſaid to have converted the trees if they continue there as before. 2 Mod. 244. *Mires* v. *Solebay*. Bull. N. P. 44. So a demand and refuſal is no evidence of a converſion in the caſe of a carrier or wharfinger, where the goods are proved to have been loſt through negligence, or ſtolen; and therefore trover does not lie, though the owner may have an action upon the caſe. 1 Vent. 223. *Owen* v. *Lewyn*. 2 Salk. 655. *Anon*. 5 Burr. 2825. *Roſs* v. *Johnſon*. Bull. N. P. 44, 45. Nor where it appears that the carrier or wharfinger detained becauſe the plaintiff refuſed to pay for the carriage or wharfage of them. 2 Ld. Raym. 752. *Skinner* v. *Upſhaw*. Ibid. 866. *Yorke* v. *Grenaugh*, and therefore if the perſon, in whoſe poſſeſſion the goods are, has a lien upon them for a debt due to him from the owner, the plaintiff muſt prove that he paid or tendered the money before the bringing of the action, for otherwiſe the defendant will have a right to retain the goods. See 3 Bulſt. 269. *Robinſon* v. *Walter*. 1 Salk. 388. *York* v. *Grindſtone*. 2 Show. 161. *Anon*. 2 Roll. Abr. 92. (M.) pl. 3. 6. Cro. Car. 271. *Chapman* v. *Allen*. Bull. N. B. 45. But if the carrier or wharfinger break open a box containing goods, or ſell them, or had them in his cuſtody at the time of the refuſal, a demand and refuſal is evidence of a converſion, and trover may be maintained, 2 Salk. 655. *Anon*.

It has been held too, that not only claiming property *as one's own*, but aſſerting the right of *another* over it, is, upon demand and refuſal, evidence of a converſion; as where it was found, that a bankrupt, being indebted to G. delivered goods to G.'s ſervant, who gave a receipt for them in his maſter's name, and ſold them for his maſter's uſe; the court determined that the ſale, whether for the uſe of the ſeller or another, was a converſion; for where a perſon takes upon himſelf to diſpoſe of another's property it is a tortious act

act and the gift of the action, 1 *Will.* 328. *Perkins* v. *Smith*. S. P. 2 Str. 813. *Parker* v. *Godin*. So where a carpenter, who worked in the king's yard, refuſed to go there any more, upon which the ſurveyor would not let him have his tools until the king's work was done under a pretended uſage to do ſo; a demand and refuſal being proved, it was held by *Holt* C. J. that the denial of goods to him who has a right to demand them is *an actual converſion*, and not evidence of it only; for what is a converſion but an aſſuming upon one's ſelf the property in, and right of diſpoſing of, another's goods? and whoever detains another man's without cauſe takes upon himſelf the right of diſpoſing of them. 6 Mod. 212. *Baldwin* v. *Cole*. So where a man, entruſted with the goods of another, puts them into the hands of a third perſon without orders, it is a converſion; as where the owner of goods on board a veſſel directed the captain not to land them on a wharf againſt which the veſſel was moored, which he promiſed not to do, but afterwards delivered them to the wharfinger for the owner's uſe under an idea that the wharfinger had a lien on them for the wharfage fees, becauſe the veſſel was unloaded againſt the wharf; it was held, that the owner upon demand and refuſal might maintain trover againſt the captain, unleſs he could eſtabliſh the wharfinger's right; for putting the goods into the cuſtody of the wharfinger brings a charge upon the plaintiff, and is therefore a converſion by the defendant. 4 Term Rep. 260. *Syeds* v. *Hay*. If a man *make uſe* of a thing, found, or delivered to him, it is a converſion, Cro. Eliz. 219. *Mulgrave* v. *Ogden* So if he *miſuſe* it, Cro Eliz. 219 as if a carrier draw out part of a veſſel and fill it with water, it is a converſion of all the liquor, 1 Str. 576. *Richardſon* v. *Atkinſon*. The taking and carrying away of another's goods is a converſion, and therefore it is not neceſſary in ſuch caſe to prove a demand and refuſal. 1 Sid. 264. *Bruen* v. *Roe*. 6 Mod. 212. *Baldwin* v. *Cole*. Bull. N. P. 44.

The next conſideration is *by* what perſons this action may be maintained; it is ſettled that one jointenant, tenant in common or parcener, cannot maintain trover againſt his companion for a thing ſtill in his poſſeſſion, becauſe the poſſeſſion of one is the poſſeſſion of both, and the defendant may take advantage of it on the general iſſue. Co. Lit. 200. a. 1 Salk. 290. *Brown* v. *Hedges* Bull. N. P. 34. Thus where the plaintiff and defendant C. were members of a friendly ſociety, which levied a fund by weekly contribution from each other, and the aggregate ſum was kept in a box depoſited with the plaintiff, who gave a bond for the ſafe cuſtody of it. C. took away the box and delivered it to the other defendant W. who was not a member of the ſociety; the learned judge who tried the cauſe nonſuited the plaintiff, and the court of K. B. on an application for a new trial confirmed the nonſuit, and ſaid, that as all the members of the ſociety had a joint property in the box and it's contents, they were therefore tenants in common, and it was an undoubted rule that one tenant in common cannot maintain trover againſt another. And moreover, as it was admitted that one of the defendants was a member of the ſociety, he had a general property in the box, and therefore a ſpecial property ſuch as the plaintiff had,

had, the cuſtody only, having been committed to him, and the general property ſtill remaining in the ſociety, could not give a right in this action againſt a general property. 1 Term Rep. 658. *Holliday* v. *Camſell*. But if one jointenant, tenant in common or parcener, *deſtroy* the thing in common, the other may bring trover. Co. Lit. 200. a. Therefore where one tenant in common of a ſhip took it away and ſent it to the *Weſt Indies* where it was loſt in a ſtorm, this was held by *King* C. J. of the C. B. to be evidence of a deſtruction, and the jury under his directions found it to be ſo. Bull. N. P. 34, 35. For in all caſes where one tenant in common *miſuſe* that which he has in common with another, he is anſwerable to the other in an action as for misfeaſance. 8 Term Rep. 145. *Martyn* v. *Knowllys*. If one jointenant, tenant in common or parcener, bring trover againſt a ſtranger, he muſt plead the jointenancy, &c. in abatement; and if he neglect to do ſo, he cannot give it in evidence on the general iſſue; but the plaintiff is entitled to recover only the value of his ſhare. 2 Lev. 113. *Nelthorpe* v. *Dorrington*. 1 Salk. 290. *Brown* v. *Hedges*. Bull. N. P. 35. See alſo 1 Saund. 291. g. h. and the authorities there cited. Where the goods of a feme ſole come into the poſſeſſion of another by finding, delivery or otherwiſe, and he converts them after her marriage, either the huſband alone may bring the action, inaſmuch as the converſion which is the cauſe of the action, was after the marriage; or the huſband and wife may join, for the inception of the cauſe of action by the finding or delivery was before the marriage; and therefore it is held, that the declaration may ſtate that the wife, while ſhe was ſole, loſt the goods, and that plaintiffs intermarried, and the defendant after their intermarriage converted them. 2 Lev. 107, 108. *Blackborn* v. *Greaves*. Bull. N. P. 34. But huſband and wife cannot have an action of trover and declare *that they were both poſſeſſed* of certain goods, and that the defendant converted them *to their damage*, for the poſſeſſion of the wife is the poſſeſſion of the huſband, and ſo is the property; therefore the converſion cannot be to the *damage of the wife*, but of the huſband. Yelv. 165, 166. *Draper* v. *Fulkes*. 1 Salk. 114. *Nelthrop* v. *Anderſon*. If an apprentice earn any thing, trover lies by the maſter; as where a waterman's widow took an apprentice who went to ſea and earned two tickets which came into the defendant's poſſeſſion, the widow brought trover for the tickets and had judgment; for what an apprentice gains is for the uſe and benefit of his maſter, and it is not material whether he be legally an apprentice or not, for it is ſufficient if he be ſo in fact. 1 Salk. 68. *Barber* v *Dennis*. S. C. 6 Mod. 69. So if a ſervant purchaſe goods for his maſter, which are afterwards converted by another, it is held that the maſter may maintain trover; for by the poſſeſſion of the ſervant the property is veſted in the maſter; although indeed the judgment was reverſed on another point. Cro. Eliz. 638. 661. 746. *Holiday* v. *Hicks*.

If a vendee of goods orders them to be ſent by a particular carrier, a delivery to him, or his ſervant, veſts the property in the vendee, who may bring trover againſt a ſtranger that detains, or takes them away; or if they are damaged or loſt, the vendee muſt ſtand to the loſs, and the action againſt the carrier can only be brought in his name.

Where a tradeſman ordered goods to be ſent him, and in his letter added, "pray be expeditious in ſending them, "and inſtead of letting them go by the "way of *Briſtol*, where many things you "have ſent me have been detained, "ſend them by *land carriage*;" the goods were delivered to the book-keeper of the *Birmingham* carrier to be ſent from thence by way of *Coventry* to the vendee who lived at *Carmarthen*; and it appeared there was *no other mode of conveyance by land carriage*. The goods being loſt, the vendor brought an action againſt the vendee for the price, inſiſting that the delivery to the carrier was a delivery to the defendant, but the learned judge who tried the cauſe, being of a different opinion, nonſuited the plaintiff; however the court of K. B. held that, as there was no other mode of ſending the goods by land carriage, it amounted to the ſame thing as if the defendant had ordered the goods to be ſent by the *Birmingham* carrier particularly by name; and therefore the delivery being made according to the order of the defendant was a delivery to, and veſted the property in, the defendant, and the nonſuit was ſet aſide. Cowp. 294. *Vale* v. *Bayle*. So where a tradeſman in the country gave an order for goods from *London*, and directed them to be ſent by a particular carrier, to whom they were accordingly delivered by the vendor, who had them booked, and paid for it: the goods being loſt, *the vendor* brought an action againſt the carrier, but was nonſuited, and the nonſuit confirmed by the court, who held that, by the delivery to a particular carrier according to the vendee's direction, the property veſted in him, and of courſe he muſt ſtand to the riſk; that the money for booking was paid by the vendor as agent of the vendee, and therefore the action could not be maintained by the vendor but ought to have been brought by the vendee. 8 Term Rep. 330. *Dawes* v. *Peck*.

It was ſaid by counſel in argument, and aſſented to by Lord Chancellor *King*, that if a tradeſman in *London* ſend goods by order to a tradeſman in the country by a carrier not appointed by the country trader, if the carrier embezzles the goods, the trader in the country muſt ſtand to the loſs. 3 P. Will. 185, 186. *Godfrey* v. *Furzo*. And this ſeems to be confirmed by Lord *Hardwicke* in 1 Atk. 248. *Snee* v. *Preſcot*, who ſays, that if goods are delivered to a carrier or hoyman to be delivered to A. and the goods are loſt, A. can only bring the action, which ſhews the property to be in him. But if the vendor agrees with the carrier to pay him for the carriage, the vendor may bring an action againſt the carrier, becauſe the vendor ſtands in the character of an inſurer to the vendee for the ſafe arrival of the goods, and it is no part of the queſtion to inquire in whom the property veſts. 5 Burr. 2680. *Davis* v. *James*. S. P. 1 Term Rep. 659. *Moore* v. *Wilſon*: and Lord *Mansfield* in *Vale* v. *Bayle*, obſerves, that if the vendor takes upon himſelf actually to deliver the goods to the vendee, he ſtands to all riſks; but if the vendee order a particular mode of conveyance, the vendor is excuſed. Cowp. 296.

Let us next inquire *againſt whom* this action may be brought. If a woman has been guilty of a converſion *before* her marriage, or a wife, without her huſband, converts goods during the coverture, this action lies againſt huſband and wife; in the former caſe the declaration muſt ſtate the converſion to be to *her own uſe*: unleſs the ſubject matter is in exiſtence, and the

huſband

huſband refuſes to deliver it up on demand, in which caſe the courſe of precedents ſeems to warrant the laying of the converſion *to their own uſe*. 2 Rich. Pract. C. P. 5th edit. 162, 163.; and in the latter caſe converſion muſt be alleged to be to the uſe *of the huſband only*; however, if the converſion be the *joint act* of huſband and wife, it ſeems the action may be brought againſt the huſband alone, for the converſion is held in law to be the act of the huſband only. Cro. Car. 254. *Rhemes* v. *Humphreys*. Ibid. 494. *Perry* v. *Diggs*. 1 Roll. Abr. 6. pl. 7. 348 (u) pl. 1. Co. Lit. 351. b. Palm. 344. *Berry* v. *Nevey*. Com. Dig. *Baron* and *Feme* (Y). And it has alſo been adjudged that the action may be brought *againſt huſband and wife*, if it be laid in the declaration that they converted *to the uſe of the huſband*; as where in trover the declaration ſtated that the goods came into the poſſeſſion of huſband and wife, and *they* converted them to the uſe of the huſband, &c. it was objected, that the converſion was laid to the charge of the wife as well as of the huſband, to which it was anſwered and reſolved, that the point of the action is the converſion, which is a wrong that a married woman may be charged with, as well as with a treſpaſs or diſſeiſin. Yelv. 165, 166. *Draper* v. *Fulkes*. S. P. 1 Roll. Abr. 6. pl. 6. but if it be alleged in the declaration that the huſband and wife converted *to their own uſe*, it is agreed, that it is a fatal error even after verdict, for a wife cannot in law convert to her own uſe. 1 Roll. Abr. 6. pl. 6. Ibid. 348. (U.) Sir *W. Jones*, 16. *Berry* v. *Nevys*. S. C. Cro. Jac. 661. Sir *W. Jones*, 264. *Bullen*'s caſe, Cro. Car. 254. *Rhemes* v. *Humphreys*, Ibid. 494. *Perry* v. *Diggs*. Andr. 243. *Smalley* v. *Kerfoot*; though the contrary was decided in Sir *W. Jones*, 443. *Hodges* v. *Sampſon*; but it is ſaid that if the jury in ſuch caſe find the wife not guilty, the declaration is aided by it. Marſh. pl. 134. But if *treſpaſs* be brought againſt huſband and wife, and the declaration ſtate a converſion by them *to their own uſe*, it does not vitiate the declaration. As where treſpaſs was brought againſt huſband and wife for breaking and entering the plaintiff's houſe and taking his goods, and converting them *to their own uſe*; after verdict for the plaintiff it was held that the converſion is not the giſt of treſpaſs, as it is of trover, treſpaſs being maintainable for entering the houſe and taking the goods, and therefore the court would not preſume that any damages were given for the converſion, it being ſurpluſage and laid as matter of aggravation, and conſequently the declaration good. Andr. 242. *Smalley* v. *Kerfoot*. S. C. 2 Str. 1094. So the action may be brought againſt any perſon who was a party to the converſion, although the goods were actually converted by another; as where an execution is delivered by A. to the ſheriff againſt the goods of B. who at the time has committed an act of bankruptcy, and A. gives a bond to indemnify the ſheriff, and he ſeizes the goods and ſells them and pays the money to A. and afterwards a commiſſion of bankruptcy is taken out againſt B. the aſſignees may bring trover againſt A. becauſe by giving the bond he has made the converſion his own act. Bull. N. P. 41.

Regularly the declaration ſhould ſtate that the plaintiff was poſſeſſed of the goods, *as of his own proper goods*, and that they came to the hands of the defendant *by finding*; but it has been held

held that the omiſſion of theſe words is not material after verdict. Moor, 691. *Maynard* v. *Baſſet*. Hard. 111. *Jones* v. *Winckworth*. Latch. 214. *Hudſon* v. *Hudſon*. And if the plaintiff has never had *actual poſſeſſion* of the goods, he need not allege that he was poſſeſſed: as where goods of a teſtator are taken and converted after his death, and before the executor obtains poſſeſſion of them, he may declare that the *teſtator* was poſſeſſed of the goods and chattels, and the defendant after his death converted them, without ſaying that the *executor* was poſſeſſed. Latch. 214. *Hudſon* v. *Hudſon* See the form of the declaration. Rob. Ent. 20. 447 2 Inſtr. Cler. 5th edit. 448. But inaſmuch as the converſion, which is the gift of the action, was after the death of the teſtator, the plaintiff will be liable to coſts, if he fails in the action. Or, as the property of the goods draws to it a poſſeſſion in law, the executor may alſo declare upon his own poſſeſſion as executor. 6 Mod. 182. *Jenkins* v. *Plombe*. Still however if he fails in the action he will be liable to coſts. Latch. 214. *Hudſon* v. *Hudſon*. Ibid. 220. *Worſield* v. *Worſield*. 1 Vent. 109. *Anon*. Cro. Car. 219. *Atkey* v. *Heard*. *Fauler* v. *Delander*. cited in Andr. 357. Caſ. Temp. Hardw. 204. *Harris* v. *Hanna*. Com. Rep. 162. *Hole* v. *King*. 7 Term Rep. 358. *Ballard* v. *Spencer*. 2 Boſ. & Pull. 256. *Tatterſall* v *Groote*. In theſe caſes it is not neceſſary for the plaintiff to name himſelf executor. 1 Salk. 314. *Eaves* v. *Mocato*. Com. Rep. 162. But where the trover and converſion have been in the teſtator's life time, there, it ſeems, the executor is not liable to pay coſts. 4 Term Rep. 277. *Cockerill* v. *Kynaſton*. S. C. cited by *Le Blanc* J. in *Ord* v. *Fenwick*. 3 Eaſt, 110. And if the goods were taken in the teſtator's life time, and kept to the time of his death, although not uſed until after, the executor may declare of a trover and converſion in the teſtator's life time. 1 Str. 60. *Croſſier* v. *Oglehy*.

If trover be brought upon the poſſeſſion of an inteſtate, the defendant, it is ſaid, cannot give in evidence upon not guilty, a will and an executor, for it muſt be pleaded; but if it be brought upon the poſſeſſion of *the adminiſtrator*, the defendant may take advantage of it in evidence. So if an executor bring trover upon his teſtator's poſſeſſion, he is not bound upon the general iſſue to prove himſelf executor, but it is otherwiſe, if he declares upon his own poſſeſſion. 7 Mod. 141. *Blainfield* v. *March*, per Holt C. J. S. C. 2 Ld. Raym. 824. 1 Salk. 285. Holt, 44.

Whenever *treſpaſs* for taking goods will lie; that is, where they are taken wrongfully, *trover* will alſo lie; for one may *qualify* but not *increaſe* a tort. Cro. Eliz. 824. *Biſhop* v. *Montague*. S. C. Cro. Jac. 50. Sir T. Raym. 472. *Put* v. *Rawſterne*. 1 Burr. 31. And if the whole rights and merits of the caſe have been diſcuſſed and determined in one action, the judgment in it may be pleaded in bar to the other. Cro. Car. 35. *Lacon* v. *Barnard*. Cro. Eliz. 668. *Ferrers* v. *Arden*. 2 Vent. 169. *Leckmere* v. *Toplady*. But the converſe of the propoſition does not hold, for trover may often be brought where treſpaſs cannot; as where goods are lent, or delivered to another to keep, and he refuſes to return them on demand, treſpaſs does not lie, but the proper remedy is trover. Sir T. Raym. 472. 2 Vent. 170. So where the taking is lawful, or at leaſt excuſeable, treſpaſs cannot be

ported, but the owner muſt bring trover. Thus where one G. on the 5th *December* 1753 obtained judgment againſt J. and on the ſame day took out execution, and J.'s goods were ſeized under it; on the 4th J. committed an act of bankruptcy, and on the 8th a commiſſion was taken out againſt him and an aſſignment executed, and afterwards on the 28th the ſheriff ſold the goods; it was held, that the ſeizing of the goods before the commiſſion and aſſignment was excuſeable, and the ſheriff was not a treſpaſſor by relation; but the ſale after the commiſſion and aſſignment was a converſion, and ſubjected the ſheriff to an action of trover at the ſuit of the aſſignees of J. 1 Bur. 20. *Cooper* v. *Chitty*. And the ſame point has been recognized and confirmed in a ſubſequent caſe, where it was held that treſpaſs would not lie, but the aſſignees ſhould have brought an action of trover. 1 Term Rep. 475. *Smith* v. *Milles*. If the plaintiff ſhould by miſtake bring treſpaſs inſtead of trover, and judgment be given againſt him for that reaſon, it ſeems the defendant cannot plead it in bar to an action of trover brought afterwards againſt him. Cro. Eliz. 668. *Ferrers* v. *Arden*. Cro. Car. 35. *Lacon* v. *Barnard* 2 Vent. 169, 170. *Lechmere* v. *Toplady*. Sir T. Raym. 472. *Put* v. *Rawſterne*. Gilb. Law of Evid. 266, 267.

(2) That caſe was this: The ſheriff of C. returned to a writ of *fieri facias* that he had taken goods to the value, for which he had not found buyers; whereupon a *venditioni exponas* iſſued returnable on the morrow of the *Aſcenſion*, at which day the ſheriff returned that the goods were taken by his predeceſſor, therefore he could not expoſe the goods to ſale; wherefore a *diſtringas nuper vicecomitem* was awarded that the late ſheriff ſhould expoſe the goods to ſale, and deliver the monies ariſing therefrom to the new ſheriff, that he might have them before the juſtices here on the octave of the *Holy Trinity* to render to the plaintiff for his debt and damages aforeſaid. S. C. Fitz. *Proceſs*, 99. Bro. *Retorne de brieſe*, 15. *Execution* 11. *Proceſs*, 15. Hence it appears, that the ſheriff after he is out of office is compellable to ſell the goods which he ſeized under the execution; for the ſame ſheriff who begins an execution muſt end it; and the *diſtringas nuper vicecomitem* does not give him an authority to ſell, but obliges him to do that which he has a power to do. 1 Roll. Abr. 893. (B). pl. 2. 1 Salk. 323. *Clerk* v. *Withers*. 6 Mod. 299. 2 Ld. Raym. 1074, 1075. S. C. The ſtudent will perhaps better underſtand the nature of the writ of *diſtringas nuper vicecomitem*, by ſeeing the form of it: "*George* the third, to the ſheriff of S. "greeting: We command you, that "you diſtrain E. F. late ſheriff of your "county by all his lands and chattels "in your bailiwick, ſo that neither he, "nor any one by him, do lay hands on "the ſame, until you have another "command from us in that behalf, and "that you anſwer us for the iſſues of "the ſame; ſo that he expoſe to ſale "thoſe goods and chattels which were "of C. D. in your bailiwick, to the "value of £. which lately in our "court *before us* (*before our juſtices at "Weſtminſter* if in C. B.) were adjudged "to A. B. for his damages which he "had ſuſtained, as well on occaſion of "not performing certain promiſes and "undertakings then lately made by the "ſaid

" ſaid C. D. to the ſaid A. B. as for " *his coſts and charges by him about* " his ſuit in that behalf expended, " whereof the ſaid C. D. is convicted, " as appears to us of record; and which " goods and chattels he lately took by " virtue of our writ, and which remain " in his hands unſold for want of buyers " as the ſaid late ſheriff returned to us " (to our ſaid juſtices, C. B.) at *Weſt-* " *minſter* at the return day of the writ " aforeſaid, and have that money be- " fore us (before our juſtices) at *Weſt-* *minſter*, on next after " (on the morrow of *All Souls*) to ren- " der to the ſaid A. B. for his damages " aforeſaid, and have there then this " writ. Witneſs, &c." See Raſt. 164. a. where the recovery was in debt in the C. B. and Theſau. Brev. 90. from which the above precedent is taken. The firſt ſtep is to call upon the old ſheriff to return the writ; which by the ſtatute 20 Geo. 2. c. 37. he muſt be required to do within ſix months after the expiration of his office, and which months are conſtrued to be *lunar* months, and the day on which he goes out of office is reckoned as one. Dougl. 463. *The King* v. *Adderley*. And if he has ſeized to the value, but not ſold, (which is the ſuppoſition,) he will return that fact, and alſo that the goods remain unſold for want of buyers; it being a good return, becauſe the law gives the ſheriff a convenient time to ſell; but he charges himſelf by it to the value returned by him. Next iſſues the writ of *diſtringas*, but the ſheriff cannot make the ſame return to it as to the *fieri facias*, for he muſt not always keep the goods in his hands for want of buyers, therefore he is bound to ſell, and pay the money under the penalty of forfeiting iſſues to the amount of the debt. 6 Mod. 295. *Clerk* v. *Withers*.

If the ſheriff makes the ſame return, *and continues in office*, the plaintiff may ſue out a writ of *venditioni exponas* to compel the ſheriff to ſell; though he may ſell without, for the writ does not give him an authority to do ſo, but is only to quicken him to do his duty. 6 Mod. 298. *Clerk* v. *Withers*. The form of the writ will beſt explain the nature of it: " *George*, &c. to the " ſheriff of S. greeting: Whereas by " our writ, we lately commanded you " that of the goods and chattels, &c. " (here recite the *fieri facias* to the end) " and you at that day returned to us " (our juſtices in C. B.) at *Weſtminſter* " aforeſaid, that by virtue of the ſaid " writ to you directed, you had taken " goods and chattels of the ſaid D. to " the value of the damages (or debt " and damages) aforeſaid, which ſaid " goods and chattels remain in your " hands unſold for want of buyers; " therefore we, being deſirous that the " ſaid A. B. ſhould be ſatisfied his da- " mages (or debt and damages) afore- " ſaid, command you that you ſell or " cauſe to be ſold the goods and chat- " tels of the ſaid C. D. by you in " form aforeſaid taken, and every part " thereof, for the beſt price that can be " got for the ſame, and at leaſt for the " damages (or debt and damages) afore- " ſaid, and have the money ariſing from " ſuch ſale before us (our juſtices, C. " B.) at *Weſtminſter* on " next after (on the morrow " of *All Souls* C. B.) to render to the " ſaid A. B. for his damages (or debt " and damages) aforeſaid, and have " there then this writ. Witneſs, &c." If the goods are not taken to the value

of the whole debt, the plaintiff may have a *venditioni exponas* for part, and a *fieri facias* for the reſidue in the ſame writ. See the form in Theſ. Brev. 305. If the ſheriff does not pay the money at the return of the writ, the plaintiff may ſue out a diſtringas againſt him directed to the coroners, and in caſe he do not ſell between the teſte and return of the diſtringas, he will forfeit iſſues to the amount of the debt. *6 Mod. 300. Clerk* v. *Withers.*

(3) See alſo 1 Roll. Abr. 893. *(B.)* pl. 2. but Lord *Hale* in *Mildmay* v. *Smith,* poſt. 345. ſays, the number of the roll was 618.

Fowell *verſus* Forreſt. Caſe 6.

Eaſter, 21 Car. II. Regis. Rol. 430.

DEBT on bond, dated the 8th of *April* in the 16th year of the reign of the preſent king; the defendant, after oyer of the condition, pleads, that after the making of the bond, to wit, on the ſame day and year, the plaintiff by his deed of defeaſance (1), here in court ſhewn, promiſed and engaged that if he ſhould not produce witneſſes, before the laſt day of *June* then next coming, to prove that the money mentioned in the condition was a true debt, and that the defendant before the making of the bond promiſed to pay it, then the bond ſhould be void, &c. and avers, that the plaintiff did not produce any witneſſes to make ſuch proof as aforeſaid: to

In debt on bond, the defendant pleads a defeaſance made after; the plea held ill; it ſhould have been made *at the ſame time*—But this does not ſeem to be law.

(1) A defeaſance is an inſtrument which defeats the force or operation of ſome other deed or eſtate; and that which in the *ſame deed* is called a condition, in *another* deed is a defeaſance. Com. Dig. Defeaſance. (A.) As where a man by deed grants that, upon payment of a leſs ſum on a particular day, an obligation, recognizance, ſtatute, &c. ſhall be void. Cro. Eliz. 623. *Hodges* v. *Smith.* Every defeaſance muſt contain proper words, as that the *thing ſhall be void.* 2 Salk. 575. *Lacy* v. *Kynaſton.* Willes's Rep. 108. *Treveth* v. *Aggas*; but a letter of licence that the *obligor ſhall not be ſued* amounts to a defeaſance. Carth. 64. *Ayloffe* v. *Scrimpſhire.* And the defeaſance muſt be by matter as high as the inſtrument to be defeated; therefore where, in debt on bond conditioned for payment of 20l. on a certain day, the defendant pleaded, that before the day the plaintiff, on account of a treſpaſs committed by his cattle on the defendant's lands, gave him a further day of payment, the plea was held bad on demurrer, becauſe an agreement by *parol* cannot diſpenſe with a *deed*

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to which the plaintiff demurred, and judgment was given for the plaintiff by *Twyſden* juſtice, *Rainsford* and *Morton* juſtices being ſilent, and *Kelynge* chief juſtice abſent, on this point only, that the defeaſance being pleaded to be made *after* the bond, could not avoid it; but in order to avoid it, the defeaſance

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deed. Cro. Eliz. 697. *Hayford* v. *Andrews* S. C Moor, 573. So where, to debt on bond conditioned for payment of money on a certain day, the defendant pleaded that the plaintiff *per ſcriptum ſuum ſub manu ſuâ ſignat'* agreed to give time to a future day, the plea was held inſufficient on a general demurrer, for the words *ſcriptum ſub manu ſuâ ſignat'* do not imply a deed. 2 Lev. 234. *Blanchard* v. *Pierſon.* See 1 Saund. 291 *a.* *Cabell* v. *Vaughan*, note (1). So where, in covenant for non-payment of money, the defendant pleaded a diſcharge in nature of a releaſe *without deed*, the plea on demurrer was adjudged to be ill. 2 Wilſ. 370. *Rogers* v *Payne.* Alſo where a leaſe contained a proviſo that the leſſee ſhould not let without leave *in writing* on pain of forfeiture, a *parol* licence was held not to diſcharge the leſſee from the proviſo. 2 Term Rep. 425 *Roe* v *Harriſon.* S. P. Cowp. 47. *Neaſe* v *Neaſe.* 3 Term Rep 590. 592. *Littler* v. *Holland,* and *Brown* v. *Goodman,* there cited, note (b).

A releaſe to one of ſeveral obligors, whether they are bound *jointly,* or *jointly and ſeverally,* diſcharges the others, and may be pleaded in bar by all. 2 Roll. Abr. 412 (G.) pl. 4, 5. 2 Salk. 574. *Clayton* v. *Kynaſton.* So where the obligee *covenants* not to ſue the obligor at all, he may plead it as a *releaſe* to avoid a circuity of action. Cro. Eliz. 623. *Hodges* v. *Smith.* 1 Term Rep. 446. *Smith* v. *Mapleback.* *per Buller* J. 8 Term. Rep. 486. *Burgh* v. *Preſton;* if the obligee covenants not to ſue the obligor *for a certain time,* it does not amount to a defeaſance, nor can it be pleaded as ſuch, but is a *covenant* only, for a breach of which the obligor may bring his action. Carth. 63. *Aſloffe* v. *Scrimſhire.* 1 Show. 46. Comber. 123, 124. 2 Salk. 573. S. C. But where a bond was conditioned that the obligor ſhould indemnify the obligee from all ſums he ſhould pay on the obligor's account, and before the bond was executed, a memorandum was indorſed on it, which was part of the condition, that the obligee *undertook* not to ſue upon the bond until after the obligor's death, it was held that the bond was not payable by the obligor himſelf, but only by his repreſentatives after his death; for the memorandum being *part of the condition,* differs it from the preceding caſe, where the agreement was a collateral one in a *different deed.* 8 Term Rep. 483. *Burgh* v. *Preſton.* So where two are bound jointly and ſeverally, and the obligee *covenants* with one of the obligors only not to ſue him, it does not amount to a releaſe, but is a *covenant* only, and the obligee may ſtill ſue the other obligor. 2 Salk. 575. *Lacy* v. *Kynaſton.* 12 Mod. 551. S. C. And the ſame point was determined in 8 Term Rep. 168. *Dean* v. *Newhall,* in which

feaſance ought to have been made *at the ſame time*, or *at the ſame inſtant* with the bond; and not having been made at that time, but after, it was not ſufficient to be pleaded in bar of the bond; and judgment was pronounced by *Twyſden*, with a *niſi*, &c.; but *Saunders* of counſel with the defendant prayed another

which the court held, upon the authority of *Lacy* v. *Kynaſton*, that where an obligee *covenanted* not to ſue one of two joint and ſeveral obligors, and if he did the deed of covenant might be pleaded in bar, he might ſtill ſue the other obligor.

A condition or defeaſance, being in favour of the obligor, conuſor, &c. muſt be ſtrictly performed; therefore if there be a condition or defeaſance to make the obligation, recognizance, &c. void, on payment of a certain ſum *on* a particular day, the obligor or conuſor muſt pay or tender the money on or before the day; but the plea of payment muſt in form ſtate it to have been made *on* the day. Cro. Eliz. 142. *Bond* v. *Richardſon*; but where it is to be void on payment of the money on *or before* ſuch a day, the plea may ſtate payment *before* the day, and the plaintiff may reply that it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day*, which will bring the point to the proper iſſue, whether the money has ever been paid at all or not; but he muſt by no means demur; the diſtinction being, that where the money is payable by the condition at a particular day, the defendant muſt plead payment at the day, but where it is *at* or *before* the day, it is otherwiſe, 2 Bur. 944. *Fletcher* v. *Hennington*. Willes's Rep. 587. n. (a.) And it will be a good bar without an acquittance under ſeal. Co. Lit. 212. b. Cro. Eliz. 823. *Earl of Huntingdon* v. *Hall*, 2 Salk. 508. *Marle* v. *Make*. And in pleading a tender according to a defeaſance *in another deed*, it is not neceſſary either to plead that the defendant *has always been and ſtill is ready to pay*, or bring the money into court; but it is ſufficient to plead that *on the day he tendered*; but if the defeaſance be in the *ſame* deed it is otherwiſe. Willes's Rep. 107. *Trevett* v. *Aggas*: Formerly payment *after* the day could not be pleaded without an acquittance by deed. 5 Rep. 43. *Nichols's* caſe, S. C. Cro. Eliz. 455. Moor, 692. Gilb. H. C. P. 140. 3d edit. However by ſtatute 4 Ann. c. 16. ſ. 12. it is enacted, that "in debt on a ſingle "bill, or debt or *ſcire facias* on a judg- "ment, if the defendant has paid the "money, the payment may be pleaded "in bar of the action or ſuit; and in "debt upon bond, which has a condi- "tion or defeaſance to make void the "ſame upon payment of a leſs ſum at a "certain day or place, if the obligor, "his heirs, executors or adminiſtrators "have before this action brought paid "to the obligee, his executors or ad- "miniſtrators the principal and intereſt "due by the defeaſance or condition, "though ſuch payment was not made "ſtrictly according to the condition or "defeaſance, yet it may nevertheleſs be "pleaded in bar of the action, and ſhall "be as effectual a bar thereof, as if the "money

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another day, whereupon *in furore* he gave judgment abſolutely, without giving any further day. And I think without much conſideration, for the law is clear, that a bond, judgment, or ſtatute, may be defeated by a defeaſance made after, as is the common and uſual practice. Co. Lit. 207. a. 236. b. 237. a. Cro. Eliz. 755. (*b*); for a defeaſance is only a conditional releaſe, and a releaſe is an abſolute defeazance. And the difference is between a thing *veſted*, and a thing *executory*; as in a feoffment of lands, the condition muſt be contained in the *ſame* charter of feoffment, or in another deed ſealed at the *ſame* time with the charter of feoffment, otherwiſe the condition is void; becauſe in a feoffment the eſtate in the land is veſted and executed in the feoffee; but a bond or judgment is only executory, and may be releaſed or defeated at any time by a deed ſealed, although it be not ſealed at the ſame time with the bond or judgment. And this is clear law without any doubt or ambiguity, although the court on a ſudden erroneouſly miſtook it, and gave judgment as before (2).

A bond, judgment or ſtatute may be defeated by a defeaſance *at a ſubſequent day*. Cro. Eliz. 623. (*b*) *Huiſh v. Philips.*

In a feoffment the condition muſt be in the ſame deed, or in another executed at the ſame time.

"money had been paid *at* the day and "place according to the condition or "defeaſance, and had been ſo pleaded;" ſo that it is now become a common plea that the defendant paid the money after the day, and before the action, according to the ſtatute.

(2) An obligation, &c. may be defeated by a defeaſance made *after* the condition is broken, as well as before. Carth. 64. *Ayloffe* v. *Scrimpſhire.*

Caſe 7. Trethewy *againſt* Ackland; and Green *againſt* the Same.

S. C. 1 Mod. 33. 2 Keb. 591. S. P. 1 Lev. 281. Jefferies v. Dee. If an executor plead ſeveral judgments, the plaintiff may in his replication anſwer one only, or every

ASSUMPSIT; the plaintiff declares againſt the defendant as adminiſtratrix of *Henry Aſhwood*, upon an *indebitatus aſſumpſit*, by the inteſtate, to the plaintiff in 418l. for cloaths made and delivered to the inteſtate in his life time by the plaintiff, who is a taylor; the defendant pleads in bar, that one *William Clifton* heretofore recovered a judgment in the court of king's bench for 120l. debt, and 46s. coſts of ſuit, againſt the defendant as adminiſtratrix of the inteſtate (*a*), and

and further pleads another judgment obtained in the ſame court by one *Nicholas Wood*, againſt the ſame defendant, as adminiſtratrix, &c. for 190l. debt, and 51s. coſts of ſuit; both which judgments appear to be on ſimple contract and not on ſpecialty,) and the defendant further avers, that the ſeveral debts at the time of the death of the inteſtate, and alſo at the time of the giving of the ſaid ſeveral judgments, were juſt and true debts, and that the ſeveral judgments are yet in full force and not ſatisfied; ſhe further ſays, that ſhe has no aſſets beyond thoſe judgments, &c. and prays judgment of the action, &c. The plaintiff replies, that he ought not to be barred, becauſe as to the judgment of *Clifton*, the plaintiff ſays, "that the ſaid judgment was had and obtained by "fraud and covin between the ſaid *William Clifton* and the "ſaid *Margaret Ackland* (the defendant) then firſt had, to de-"fraud him (the plaintiff) and the other creditors of the ſaid "*Henry Aſhwood* of their true and juſt debts; without this "that the ſaid ſum of 120l. (being the debt recovered by "*Clifton*) was due to the ſaid *William Clifton* at the time the ſaid judgment was obtained, in manner and form as "the ſaid *Margaret* (the defendant) has above thereof in "pleading alleged: and this he is ready to verify; wherefore "he prays judgment, and his ſaid damages to be adjudged "to him." And as to the judgment of *Wood*, the plaintiff replies the ſame matter (*mutatis mutandis*) as before; whereupon the defendant demurs in law ſpecially, and ſhews for cauſe, "that the plea above in replying pleaded is double, and "contains two matters, any one of which by itſelf was alone "ſufficient to maintain the ſaid action, and alſo that the ſe-"veral traverſes aforeſaid ought to be omitted out of the ſaid "plea, &c." And it was moved for the defendant, that the plaintiff's replication was clearly double, becauſe when the plaintiff by his replication, admitting it to be good, had avoided *Clifton*'s judgment, he will have a general judgment, againſt the defendant *de bonis inteſtatoris* without more, and ſo it is if he avoids *Wood*'s judgment; if then the plaintiff will recover by the avoidance of any one of the judgments, he ought not to perplex the court with two matters to enveigle the judgment of the court. For ſuppoſe two iſſues ſhould be joined

judgment pleaded. And if he replies, that the judgment was by fraud, he may rely upon the fraud generally, or traverſe the ſpecial matter.

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joined upon the two ſeveral traverſes in the plaintiff's replication, and one ſhould be found for the plaintiff, and the other for the defendant, for whom ſhall judgment be given, for the plaintiff or for the defendant? But if iſſue be joined upon one only, there will be no ſuch inconvenience; and if the defendant's plea be bad or falſe in part, it ſhall be wholly ſet aſide (1), and the plaintiff ſhall have his judgment generally as aforeſaid; and therefore it was concluded that the replication was double, and the defendant having demurred ſpecially thereto, judgment ought to be given for him. *Sed non allocatur*; for the court over-ruled it without any regard to the objection, as they had done often times before: however, with great ſubmiſſion, it is an anomalous caſe, and againſt the rules of law which condemn double pleading; but it has been allowed in this particular caſe ſeveral times, and ſo is *Turner's* caſe, 8 Rep. 132, 133. and *Meriel Treſham's* caſe, 9 Rep. 108. (2). In the next place it was moved for the defendant, that the traverſers in the replication ought to be omitted, and that the plaintiff ſhould have relied only upon the fraud pleaded by him in his inducement, and iſſue ought to be joined upon it, and not whether the money was due at the time of the judgments. For if iſſue ſhould be joined on the laſt averment, it might be miſchievous to the defendant; for perhaps a ſmall ſum may have been paid by the inteſtate in his life-time, of which the defendant had not any notice; in which caſe the whole iſſue would be found againſt the defendant, although there was no fraud or covin in him, and notwithſtanding there was but one penny only deficient in the whole ſum contained in the judgments, which would be inconvenient and miſchievous to the defendant. But on the other hand there will be no miſchief or inconvenience to the plaintiff, if iſſue be joined on the fraud; for if it appear in evidence that the defendant has confeſſed thoſe judgments where no money was due, or

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(1) See 1 Saund. 28. *Earl of Mancheſter* v. *Vale*, and note (3).

(2) See 1 Saund. 337. *Hancoke* v. *Prowd*, and 337. b. note (2.) 1 Ld. Raym. 263. *Aſkton* v. *Sherman*. S. C. 1 Salk. 298.

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or that the judgments were for a greater ſum than was due, of which the defendant was conuſant, it is full evidence of fraud and covin, and the verdict ought to be found accordingly, and ſo the true merits of the cauſe would be tried on both ſides. And as a proof that the iſſue ought to be found upon the fraud generally, and not upon the ſpecial matter, *Beaumont*'s caſe, in Latch's Rep. 111. was cited, where it is ſo adjudged. *Sed non allocatur;* for by the court the plaintiff may traverſe the ſpecial matter or rely on the fraud generally at his election, and either way is good (3): and judgment

(3) This reſolution is cited and recognized in Com. Dig. *Pleader* (2 D. 9). It ſeems however doubtful whether the traverſe is good; for in addition to the objection above taken by the reporter, it may further be obſerved, that it is not neceſſary for an executor who pleads an outſtanding judgment to aver, that the debt, for which the judgment has been had, was a true and juſt debt; ſee 1 Saund. 330. *Hancoke* v. *Prowd.* note (4.) and the authorities there cited; if it be not ſo, the plaintiff may reply that the judgment was obtained or kept on foot by fraud, 1 Str. 410. *Williams* v. *Fowler*; which the defendant is bound to traverſe in his rejoinder. Sir W. Jones, 92. *Veale* v. *Gateſdon.* 1 Ld. Raym. 678. *Parker* v. *Atfield*, and ſee 1 Saund. 334. *Hancoke* v. *Prowd*, note (9.) So that the plaintiff may on this iſſue give in evidence either that the debt is not a juſt one, or that leſs is due than the ſum for which the judgment has been given. It is true that in *Green* v. *Wilcocks*, Cro. Eliz. (462.) it was held that the plaintiff could not, to a judgment pleaded by an executor, reply that it was obtained by fraud and covin, and rely upon it, but muſt alſo traverſe that the judgment was for a juſt debt. That caſe is in ſome meaſure over-ruled by the preſent, the court here ſaying that the plaintiff may either rely on the fraud, *or traverſe* the debt at his election. But in 1 Lutw. 662. *Rolleſton* v. *Corbett*, it was ſaid by *Powell* J. and which has been adopted ever ſince, that the plaintiff *cannot inſiſt upon any thing but the fraud*, and that the opinion in *Green* v. *Wilcocks* had been a long time exploded, and there was no need to plead that the judgment was for a true debt.

The traverſe ſeems to be an immaterial one on another ground, which is, that it is added after a confeſſion and avoidance. It has already been ſhewn that a traverſe of a matter which has already been ſufficiently confeſſed and avoided, is impertinent and ſuperfluous. 1 Saund. 22. *Bennet* v. *Filkins*, note (2.) 209. *Salmon* v. *Smith*, note (8). Here the judgment is confeſſed and avoided by the allegation that it was obtained by fraud, it being held that the plaintiff may avoid a judgment had againſt an executor without good cauſe and by covin, by replying that it was ſo obtained, and relying upon it; but if it be had for a

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without any heſitation, was given for the plaintiff, that the replication was good. Note, in *Eaſter* the 18th of the preſent king, between *Norton* and Lady *Harvey*, executrix of Sir *Job Harvey* (*b*), it was adjudged in this court, that where the defendant, in bar to an action of debt upon bond, had pleaded ſeveral judgments for large ſums obtained againſt the teſtator, and among the reſt had pleaded a judgment recovered againſt the teſtator and one *Eraſmus Harvey*, but did not aver that *Eraſmus* died before the teſtator, ſo that it did not appear that the defendant was liable to that judgment (*a*), and therefore the plea was inſufficient in that part; and although ſhe averred that ſhe had aſſets only to a ſmall ſum, yet for this defect the plea was adjudged inſufficient, and bad in the whole, and judgment given againſt the defendant *de bonis teſtatoris* generally, and all the judgments, which were well pleaded, ſet aſide; and the judgment was afterwards affirmed in the exchequer chamber (4); the roll whereof is in K. B. Trin. 17 Charles 2. Rol. 134.

(*b*) S. C. Sir T. Raym. 153. An executrix pleads ſeveral judgments for large ſums, and for want of an averment it does not appear that ſhe was liable to one of them, the whole plea adjudged bad, though ſhe averred that ſhe had aſſets only to a ſmall ſum.

[(*a*) 51]

true debt, though by covin to defeat the plaintiff, he cannot avoid the judgment. Sir W. Jones, 91, 92. *Veale* v. *Gateſdon*, 1 and 2 reſolution. For it has been adjudged, that the defendant the executor may confeſs a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar; and though it be done for the expreſs purpoſe of depriving the plaintiff of the debt it is good both in law and equity. 1 P. Will. 295. *Waring* v. *Danvers*. S. P. Caſ. Temp. Talb. 225. *Morice* v. *Bank of England*. Beſides which, I have not been able to meet with any entry either in print or manuſcript, where ſuch a traverſe as the preſent has been added; therefore it ſeems to be informal and bad upon a ſpecial demurrer.

(4) See 1 Saund. 337. note (1.) but if the fact were, that the teſtator ſurvived *Eraſmus Harvey* the court would now in all probability permit the defendant to amend the plea.

But although the judgment ſurvives as to the perſonalty, yet it does not as to the real eſtate: for at common law the plaintiff might take the goods of the ſurvivor in execution by a *fieri facias*; but the plaintiff under the ſtatute of *Weſtminſter* 2d muſt ſue out an *elegit* againſt the lands of the ſurvivor, and alſo of the heir and tertenants of the deceaſed; and muſt ſue out a *ſcire facias* againſt the ſurvivor, and the heir and tertenants of the deceaſed. For it ſeems that where the *lands* of ſeveral are charged with a debt, it ſhall not lie wholly upon the ſurvivor; as if a recognizance be acknowledged by ſeveral, the lands of them all are thereby become chargeable, and exe-

cution

cution muſt be equally made, and if one dies, the creditor muſt bring a *ſcire facias* againſt his heir and tertenants, and alſo againſt the ſurvivors; but it is otherwiſe where the lands are not bound; as if two enter into a bond, and one dies before judgment, the ſurvivor ſhall be charged alone. 4 Mod. 315. *Lampton* v. *Collingwood*. So where judgment in debt was had againſt two, one died, the plaintiff brought *ſcire facias* againſt the ſurvivor only; the defendant pleaded that the other had left lands and an heir upon whom they had deſcended, and demanded judgment if he ſhould be compelled to anſwer without the heir being warned; to which the plaintiff demurred, and judgment was given that the defendant ſhould anſwer; for the judgment is againſt the perſon; and although now by the ſtatute of *Weſtminſter* the ſecond, which gives *the ſcire facias*, and *elegit*, he may charge the lands and make the judgment real, yet it is at his election to proceed in the perſonalty if he will. But if he will take out execution upon *the real lien*, *the charge muſt be equally againſt both*, and the *ſcire facias againſt both*. But it was ſaid, that if he brings *ſcire facias* againſt both and has judgment upon it, he may have a *fieri facias* againſt the ſurvivor only, or an *elegit* againſt both. 1 Lev. 30. *Smarte* v. *Edſun.* S. C. Sir T. Raym. 26. 3 Bac. Abr. 698. 4 Bac. Abr. 419. See further for this diſtinction between a real and perſonal execution, that a perſonal execution ſurvives, but a real does not. 3 Rep. 14. Sir *William Harbert*'s caſe. 1 Salk. 320. *Pennoir* v. *Brace*. Carth. 105. *Panton* v. *Hall*.

Poſterne *againſt* Hanſon and Hooker, ſheriff of Middleſex.

Caſe 8.

Trinity, 21ſt of King *Charles* the 2d. Rol. 465.

MIDDLESEX, to wit, Be it remembered that heretofore, to wit, in *Hilary* term in the 19th and 20th years of the reign of our lord Charles the 2d, now king of *England*, &c. before our ſaid lord the king at *Weſtminſter*, came *Thomas Poſterne*, by *John Hawkins* his attorney, and brought here into the court of our ſaid lord the king then there, his certain bill againſt Sir *Robert Hanſon*, knt. and Sir *William Hooker*, knt. late ſheriff of the county of *Middleſex*, in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, that is to ſay; *Middleſex*, to wit, *Thomas Poſterne* complains

of

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of Sir *Robert Hanſon*, knt. and Sir *William Hooker*, knt. late ſheriff of the county of *Middleſex*, being in the cuſtody of the marſhal of the marſhalſea, of our lord the king, before the king himſelf, for this, to wit, that whereas by a certain act made and provided in the parliament of the lord *Henry* the 6th, after the conqueſt, heretofore king of *England*, holden at *Weſtminſter* in the ſaid county of *Middleſex*, the 25th day of *February* in the 23d year of his reign, it was (among other things) enacted by the authority of the ſaid parliament, that the ſheriff, under ſheriff, ſheriff's clerk, ſteward or bailiff of franchiſe, ſervant or bailiff, or coroner, ſhould not take any thing by colour of his office, by him, nor by any other perſon to his uſe, of any perſon for the making of any return or panel, and for the copy of any panel beyond 4d.; and that the ſaid ſheriffs, and all other officers and miniſters aforeſaid, ſhould let out of priſon all manner of perſons by them, or any of them, arreſted, or being in their cuſtody, by force of any writ, bill or warrant, in any action perſonal, or by cauſe of indictment of treſpaſs, upon reaſonable ſureties of ſufficient perſons having ſufficient within the counties where ſuch perſons ſhould be ſo let to bail or mainpriſe, to keep their days in ſuch places as the ſaid writs, bills or warrants ſhould require, as by the ſaid ſtatute (among other things) more fully appears; and it was further enacted by the ſaid act (among other things) that if the ſaid ſheriffs return upon any perſon *capi corpus*, or *reddidit ſe*, that the ſaid ſheriffs ſhould be chargeable to have the bodies of the ſaid perſons at the days of the returns of the ſaid writs, bills or warrants, in ſuch form as they were before the making of the ſaid act, as by the ſaid ſtatute (among other things) more fully appears: after the making of which ſaid act, one *Michael Drew* eſq. on the 8th day of *Auguſt* in the year of our lord 1664, at *Weſtminſter*, in the ſaid county, by the name of *Michael Drew*, of the *Middle Temple*, eſq. by his certain writing obligatory, ſealed with the ſeal of him the ſaid *Michael*, bearing date the ſame day and year, became held and bound to the ſaid *Thomas Poſterne* by the name of *Thomas Poſterne* of *London*, victualler, in 240l. of lawful money of *England* to be paid to the ſaid *Thomas Poſterne*, when he ſhould be thereto

Stat. 23 H. 6. c. 9.

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M. D. gave his bond to the plaintiff for 240l.

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thereto required, as by the ſaid writing obligatory more fully appears. And whereas alſo the ſaid 240l. not being paid to the ſaid *Thomas* according to the force, form, and effect of the ſaid writing obligatory, whereby the ſaid writing obligatory became forfeited, he the ſaid *Thomas*, for the execution and recovery of his ſaid debt in the ſaid writing obligatory above mentioned and ſpecified, afterwards, to wit, on the 27th day of *July*, in the 18th year of the reign of our lord *Charles* the 2d. now king of *England*, proſecuted out of the court of our ſaid lord the now king before the king himſelf, called the king's bench (the ſaid court then being at *Weſtminſter* aforeſaid in the ſaid county of *Middleſex*) a certain precept of our ſaid lord the king, called a bill of *Middleſex*, againſt the ſaid *Michael Drew*, directed to the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then ſheriff of the ſaid county of *Middleſex*, by which ſaid precept our ſaid lord the king commanded the ſaid Sir *Robert Hanſon* and Sir *William Hooker* then ſheriff of the ſaid county of *Middleſex*, that he the ſaid ſheriff ſhould take the ſaid *Michael* if, &c. and him ſafely, &c. ſo that he ſhould have his body before our ſaid lord the king at *Weſtminſter* aforeſaid, on *Tueſday* next after three weeks of *St. Michael* then next following, to anſwer the ſaid *Thomas Poſterne* of a plea of treſpaſs, *and* (1) *alſo* to a bill of him the ſaid

the money not being paid.

plaintiff ſued out a bill of Middleſex againſt M. D.

which is ſet out.

(1) The clauſe of *ac etiam* was inſerted in the bill of *Middleſex*, and *latitat*, in conſequence of the ſtatute 13. Car. 2. c. 2. ſ. 2. in order to preſerve the juriſdiction of the court of king's bench over civil cauſes, where a party was to be arreſted for above 40l.; for that ſtatute enacts, "that no perſon "arreſted by any ſheriff, &c. by force "or color of any bailable writ, bill or "proceſs, iſſuing out of the courts of "king's bench and common pleas, or "either of them, *wherein the certainty* "*and true cauſe of action is not expreſſed* "*particularly*, ſhall be compelled to "give ſecurity, or to enter into a bond "with ſureties for his appearance, in "any penalty or ſum of money exceeding the ſum of 40l.; but the ſheriff, "&c. ſhall let to bail every perſon by "him arreſted upon any ſuch writ, bill "or proceſs, *wherein the certainty and* "*true cauſe of action is not particularly* "*expreſſed*, upon ſecurity in the ſum of "40l. and no more, for his appearance." We may remember, that the bill of *Middleſex*, or *latitat*, was framed only for actions of treſpaſs and frauds, (ſee *ante* p. 1. note (1.); therefore regularly a defendant could not be arreſted and

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Plaintiff ſued out ſuch precept with an intent that M. D. might be arreſted by virtue thereof,

ſaid *Thomas* to be exhibited againſt the ſaid *Michael* for the ſaid 240l. according to the cuſtom of the court of our ſaid lord the king before the king himſelf, and that he ſhould have there then that precept; which ſaid precept he the ſaid *Thomas Poſterne* in form aforeſaid proſecuted, out of the ſaid court of our ſaid lord the king before the king himſelf, againſt the

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holden to bail by virtue thereof for breaches of civil contracts. The practice however before the ſtatute was, to arreſt and hold the defendant to bail, upon a *common* bill of *Middleſex*, or *latitat*, for any ſum of money without expreſſing the particular cauſe of action, though the ſheriff might, if he would, have taken a bond of the defendant for 40l. only for his appearance under the ſtatute 23 H. 6. c. 9. (ſee poſt, 53): and this perhaps was the reaſon why the legiſlature by the before-mentioned ſtatute ſtill authoriſed an arreſt for the ſum of 40l. without expreſſing the certainty and true cauſe of action, or according to the modern phraſe, without an *ac etiam* clauſe in the proceſs by which the defendant is arreſted. Cro. Jac. 286, 287. *Villiers* v. *Haſtings*. 1 H. Black. 310. *Lockwood* v. *Hill*. To remedy this miſchief, the ſtatute 13 Car. 2. was made, and the court of king's bench would thereby have been deprived of it's juriſdiction of arreſting and holding to bail for a ſum exceeding 40l. if the officers of the court had not, almoſt immediately after the paſſing of the act, hit upon the expedient of inſerting in their proceſs an *ac etiam*, or ſpecial clauſe, expreſſing the true cauſe of action, in addition to the general complaint of treſpaſs; the form of which is the ſame with that in this entry. In imitation of which, lord chief juſtice *North*, a few years afterwards, in order to ſave the ſuitors of his court the trouble and expence of ſuing out *ſpecial* originals, directed that, in the common pleas, beſides the uſual complaint of breaking the plaintiff's cloſe, a clauſe of *ac etiam* might alſo be added to the writ of *capias* containing the true cauſe of action; as, "that the ſaid C. (the "defendant) may anſwer to the plain-"tiff of a plea of treſpaſs in breaking "his cloſe: and alſo (*ac etiam*,) may "anſwer him according to the cuſtom "of the court, in a certain plea of treſ-"paſs upon the caſe upon promiſes, to "the value of 20l. &c." 3 Black. Com. 288.

Upon this ſtatute the court of king's bench made a rule, that no attorney ſhould make any precept or writ with a clauſe of *ac etiam*, &c. againſt an heir, executor or adminiſtrator, nor in any caſe where, by the courſe of the court, ſpecial bail was not required. R. M. 15 Car. 2. ſ. 2.

The words, "*of a plea of treſpaſs*," were formerly held to be material, and it was neceſſary to inſert them in the bill of *Middleſex*, or *latitat*, 2 Str. 1072. *Caſwall* v. *Martin*; but they are now conſidered as mere matter of form; therefore where a motion was made to ſtay proceedings on a bill of *Middleſex*, which was in a plea of *debt* only, and not of *treſpaſs*, with an *ac etiam* in debt,

the

the ſaid *Michael Drew*, with the intent that the ſaid *Michael* might be arreſted and taken, by virtue of the ſaid precept, to appear in the ſaid court of our ſaid lord the king before the king himſelf, on the ſaid *Tueſday* next after the ſaid three weeks of *St. Michael*, being the day of the return of the ſaid precept, to anſwer the ſaid *Thomas Poſterne* of the plea of treſpaſs and bill aforeſaid, according to the exigence of the ſaid precept; and that the ſaid *Michael* upon ſuch his appearance there might be committed to the cuſtody of the marſhal of the marſhalſea of our ſaid lord the king before the king himſelf, or put in ſufficient bail in the ſaid court of our ſaid lord the king before the king himſelf, according to the courſe and cuſtom of the ſaid court uſed from time whereof the memory of man is not to the contrary, at the ſuit of him the ſaid *Thomas Poſterne*, in the plea and bill aforeſaid; and likewiſe with the intent that he the ſaid *Thomas Poſterne*, upon ſuch appearance, commitment, or bail, in form aforeſaid had and put in, might exhibit his bill and declaration againſt him, for the recovery of his ſaid debt, according to the courſe and cuſtom uſed in the ſaid court from the time aforeſaid, and thereupon recover his debt aforeſaid againſt the ſaid *Michael* according to a due courſe of law: which ſaid precept he the ſaid *Thomas Poſterne* afterwards and before the return thereof, to wit, on the ſaid 27th day of *July* in the 18th year aforeſaid, at *Weſtminſter* in the ſaid county of *Middleſex*, delivered to the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then being ſheriff of the ſaid county of *Middleſex*, to be by them executed in due form of law; by virtue of which ſaid precept, they the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county of *Middleſex*, afterwards and

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and either be committed to the cuſtody of the marſhal or put in bail.

Precept delivered to defendants being ſheriff of Middleſex,

who arreſted the ſaid M. D.

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the court ordered the bill to be amended, by inſerting the plea of *treſpaſs*. 1 Black. Rep. 462. *Cox* v. *Mundy*. And in a ſubſequent caſe, where the bill of *Middleſex* was to anſwer the plaintiff in a plea of *debt*, inſtead of *treſpaſs*, and alſo to a bill to be exhibited in a plea of treſpaſs upon the caſe, the court refuſed to grant a rule for ſetting it aſide on the authority of a caſe, which was read from the maſter's book exactly ſimilar. Mich. 20. Geo. 3. 2 Term Rep. 513. *Barber* v. *Lloyd*—and the ſame application had been alſo refuſed in H. 24 Geo. 3. Ibid. note (a.)

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and before the return thereof, to wit, on the day and year laſt aforeſaid, at *Weſtminſter* aforeſaid, in the ſaid county of *Middleſex*, took and arreſted the ſaid *Michael Drew*, and then and there had and kept him the ſaid *Michael* then and there in priſon under his cuſtody, by virtue of the ſaid precept, at the ſuit of him the ſaid *Thomas Poſterne*; and the ſaid *Michael* being ſo as aforeſaid in priſon for the cauſe aforeſaid under the cuſtody of the ſaid Sir *Robert Hanſon* and Sir *William Hooker* then ſheriff of the ſaid county of *Middleſex*, and the ſaid *Michael* being in form aforeſaid indebted to the ſaid *Thomas* in the ſaid 240l. the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then being ſheriff of the ſaid county of *Middleſex* as aforeſaid, not conſidering the duty of his ſaid office, but contriving and fraudulently intending not only to aggrieve him the ſaid *Thomas* in the ſaid premiſes, and to deprive him of the benefit of the ſaid arreſt, and of his competent remedy for the recovery of the ſaid 240l. afterwards, to wit, on the day and year aforeſaid, the ſaid *Michael Drew* then in form aforeſaid being on that occaſion in the ſaid priſon under the cuſtody of the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then being ſheriff of the ſaid county of *Middleſex*, they the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then in form aforeſaid being ſheriff of the ſaid county of *Middleſex*, at *Weſtminſter* aforeſaid, in the county aforeſaid, let him the ſaid *Michael* to bail upon the ſecurity of a certain writing obligatory of 40l. of lawful money of *England*, made ſealed and delivered by the ſaid *Michael Drew* and one *Obedia Allen*, and one *Richard Lee*, to the ſaid Sir *Robert Hanſon* and Sir *William Hooker*, then ſheriff of the county aforeſaid, for the appearance of him the ſaid *Michael* according to the exigence of the precept: whereas in truth the ſaid *Obedia* and *Richard* were not reaſonable ſureties, nor had they the ſaid *Obedia* and *Richard* a ſufficient eſtate, at the time of making the ſaid writing obligatory, or ever afterwards hitherto, within the ſaid county, nor did the ſaid *Michael* appear in the ſaid court of our ſaid lord the king before the king himſelf, on the ſaid day of the return of the ſaid precept, or ever afterwards hitherto, and juſtify ſufficient bail in the ſaid court at the ſuit of the ſaid *Thomas Poſterne*, according

Breach

that the ſheriff let him the ſaid M. D. to bail upon ſecurity by bond of 40l. for his appearance at the return of the precept.

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The ſureties inſufficient,

and M. D. did not appear at the return of the ſaid precept, and juſtify bail.

to

to the exigence of the ſaid precept; by reaſon whereof he the ſaid *Thomas Poſterne* has totally loſt and been deprived of all remedy of recovering his ſaid debt; wherefore he the ſaid *Thomas Poſterne* ſays that he is injured, and has ſuſtained damage to the value of 40l. and therefore he brings ſuit, &c.

Plea.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this ſame term, until which day the ſaid Sir *Robert* and Sir *William* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter*, come as well the ſaid *Thomas* by his ſaid attorney, as the ſaid Sir *Robert* and Sir *William* by *William Haſtings* their attorney. And the ſaid Sir *Robert* and Sir *William* defend the wrong and injury when, &c. and ſay, that the ſaid *Thomas Poſterne* ought not to have or maintain his ſaid action thereof againſt them the ſaid Sir *Robert* and Sir *William*, becauſe they ſay, that at the parliament of the lord *Henry* the 6th after the conqueſt, heretofore king of *England*, holden at *Weſtminſter* in the county of *Middleſex*, on the 25th day of *February* in the 23d year of his reign, the ſaid lord the king, conſidering the great perjury, extortion and oppreſſion, which then were, and had been, in this realm, by ſheriffs, under-ſheriffs and their clerks, coroners, ſtewards of franchiſes, bailiffs and keepers of priſons and other officers, in divers counties of this realm, ordained (among other things) by authority of the ſaid parliament, in eſchewing of all ſuch extortion, perjury and oppreſſion, that no ſheriff ſhould let to farm in any manner his county, nor any of his bailiwicks, hundreds, nor wapentakes; nor that the ſaid ſheriffs, under-ſheriffs, bailiffs of franchiſes, nor any other bailiff ſhould return, upon any writ or precept to them directed to be returned, any inqueſts in any panel thereupon to be made, any bailiffs, officers or ſervants to any of the officers aforeſaid, in any panel by them ſo to be made; nor that any of the ſaid officers and miniſters, by occaſion, or under color of their office, ſhould take any other thing by them, nor by any other perſon to their uſe, profit or avail, of any perſon by them, or any of them, to be arreſted, or attached, nor of any other for them, for the omitting of any arreſt or attachment to be made by their body, or of any perſon by them or any of them,

Defendants ſet out the act of 23 H. 6. c. 9.

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by force or color of their office, arreſted or attached, for fine, fee, ſuit of priſon, mainpriſe, letting to bail, or ſhewing any eaſe or favour to any ſuch perſon ſo arreſted, or to be arreſted, for their reward or profit, except ſuch as follows; that is to ſay, for the ſheriff 20 pence; the bailiff who ſhould make the arreſt or attachment four-pence; and the gaoler, if the priſoner ſhould be committed to his ward, four-pence; and that the ſheriff, under-ſheriff, ſheriff's clerk, ſteward or bailiff of franchiſe, ſervant or bailiff, or coroner ſhould not take any thing by color of his office by him, nor by any other perſon to his uſe, of any perſon for the making of any return or panel, and for the copy of any panel, not above four-pence; and that the ſaid ſheriffs, and all other officers and miniſters aforeſaid, ſhould let out of priſon, all manner of perſons by them, or any of them arreſted, or being in their cuſtody, by force of any writ, bill or warrant, in any action perſonal, or by cauſe of indictment or treſpaſs, upon reaſonable ſureties of ſufficient perſons, having ſufficient within the counties where ſuch perſons ſhould be ſo let to bail or mainprize, to keep their days in ſuch places, as the ſaid writs, bill or warrants ſhould require, ſuch perſon or perſons who then were, or ſhould be, in their ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, ſurety of the peace, and all ſuch perſons who then were, or ſhould be, committed to ward by the ſpecial commandment of any juſtice, and vagabonds refuſing to ſerve according to the form of the ſtatute of laborers, only excepted: and that no ſheriff, nor any of the officers or miniſters aforeſaid, ſhould take or cauſe to be taken or make, any obligation for any cauſe aforeſaid, or by color of their office, but only to themſelves, of any perſon, nor by any perſon who ſhould be in their ward, by the courſe of the law, but by the name of their office, and upon condition written that the ſaid priſoners ſhould appear at the day contained in the ſaid writ, bill or warrant, and in ſuch places as the ſaid writs, bills or warrants ſhould require; and if any of the ſaid ſheriffs, or other officers or miniſters aforeſaid ſhould take any obligation in any other form by color of their office, that then it ſhould be void; and that if the ſaid ſheriffs ſhould return upon

upon any perſon *cepi corpus*, or *reddidit ſe*, that they ſhould be chargeable to have the bodies of ſuch perſons at the days of the return of the ſaid writs, bills or warrants, in ſuch form as they were before the making of the ſaid act, as by the ſaid act (among other things) more fully appears. And the ſaid Sir *Robert* and Sir *William* in fact ſay, that after the making and publiſhing of the ſaid act, and after the ſuing out of the ſaid bill of *Middleſex* in the ſaid declaration of the ſaid *Thomas Poſterne* above ſpecified, and alſo after the delivery of the ſaid bill to the ſaid Sir *Robert* and Sir *William*, then ſheriff of the ſaid county of *Middleſex*, and before the return of the ſaid bill of *Middleſex*, to wit, on the 27th day of *July* in the 18th year of the reign of our ſaid lord the now king, at *Weſtminſter* aforeſaid, in the ſaid county of *Middleſex*, they the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county, took and arreſted the ſaid *Michael Drew* by virtue of the ſaid precept, and him the ſaid *Michael Drew* kept and detained in their cuſtody by virtue of the ſaid precept; and the ſaid *Michael Drew* ſo being in the cuſtody of them the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county, for the cauſe aforeſaid, he the ſaid *Michael Drew*, and one *Obedia Allen* and one *Richard Lee*, by the names of *Obedia Allen* of great *Tower-hill* and the liberties of the *Tower*, merchant, otherwiſe called, *Obedia Allen*, of great *Tower-hill* and the liberties of the *Tower*, merchant, and *Richard Lee* citizen and grocer of *London*, otherwiſe called, *Richard Lee* citizen and grocer of *London*, then being the ſureties of him the ſaid *Michael Drew*, in purſuance and performance of the ſaid clauſe of the ſaid act of parliament, afterwards and before the return of the ſaid precept, to wit, on the day and year laſt mentioned, at *Weſtminſter* aforeſaid, in the county aforeſaid, by their certain writing obligatory, ſealed with their ſeals, bearing date the day and year laſt mentioned, became bound jointly and ſeverally to them the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county, by the names of Sir *Robert Hanſon*, knt. and Sir *William Hooker*, knt. ſheriff of the ſaid county, in the ſum of 40l. of lawful money of *England*, with a condition underwritten to the ſaid writing obligatory, that if the ſaid *Michael*

Defendants arreſted M. D. by virtue of the ſaid precept,

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whereupon the ſaid M. D. and O. A. and R. L gave a bail-bond in 40l. to the defendants for appearance of the ſaid M. D. at the return of the ſaid precept;

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Drew ſhould appear before our lord the king at *Weſtminſter*, on *Tueſday* next after three weeks of *St. Michael* then next following, to anſwer the ſaid *Thomas Poſterne* of the ſaid plea of treſpaſs, and alſo to the bill of him the ſaid *Thomas* to be exhibited againſt the ſaid *Michael* for 240l. of debt, according to the cuſtom of the court of the ſaid lord the king before the king himſelf, that then the ſaid obligation ſhould be void, otherwiſe it ſhould remain in full force; which ſaid writing obligatory, in form, and for the cauſe aforeſaid made by the ſaid *Michael Drew*, *Obedia Allen* and *Richard Lee* to them the ſaid Sir *Robert* and Sir *William*, being ſheriff of the ſaid county, at the time of making the ſaid writing obligatory, was a reaſonable ſecurity of ſufficient perſons; the ſaid *Michael Drew*, *Obedia Allen* and *Richard Lee* then, to wit, at the time of making the ſaid writing obligatory, *having* ſufficient eſtate within the ſaid county of *Middleſex*, to wit at *Weſtminſter* aforeſaid, in the county of *Middleſex* aforeſaid; whereupon they the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county, afterwards and before the return of the ſaid precept, to wit, on the day and year laſt mentioned, at *Weſtminſter* aforeſaid, in the county aforeſaid, then and there let out of their ſaid priſon upon the ſaid bail and mainpriſe, by the ſaid writing obligatory in form aforeſaid made, the ſaid *Michael Drew* by them the ſaid Sir *Robert* and Sir *William* ſo as aforeſaid arreſted, and then as aforeſaid detained in their cuſtody for the cauſe aforeſaid by virtue of the ſaid precept, and permitted him to go at large according to the exigence of the ſaid act; and they the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the ſaid county, afterwards and before the return of the ſaid bill of *Middleſex*, to wit, on the day and year laſt mentioned, at *Weſtminſter* aforeſaid, in the county aforeſaid, returned upon the ſaid precept into the court of our ſaid lord the king before the king himſelf, that he, by virtue of the ſaid precept to him directed, had taken the body of the ſaid *Michael Drew*, whoſe body *he had ready* before our ſaid lord the king at the day and place mentioned in the ſaid precept, as they the ſaid Sir *Robert* and Sir *William*, then being ſheriff of the county of *Middleſex*, lawfully might by force of the ſaid act, and according to the ancient

the bond was a reaſonable ſecurity.

whereupon defendants let the ſaid M. D. out of their cuſtody, on bail.

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and returned *cepi corpus*, and *paratum habeo*.

ancient courſe of law in ſuch caſe uſed, as well before, as after, the making of the act aforeſaid. And this they the ſaid Sir *Robert* and Sir *William* are ready to verify; wherefore they pray judgment if the ſaid *Thomas Poſterne* ought to have or maintain his ſaid action thereof againſt them, &c.: with this that they the ſaid Sir *Robert* and Sir *William* will verify that it now is, and always has been the conſtant and uniform uſage and practice, as well of this court, as of all other the courts of our lord the now king, his anceſtors, and predeceſſors, kings and queens of *England*, at *Weſtminſter* aforeſaid, at all times, as well before the making of the ſaid act of parliament, as after the making and publiſhing of the ſaid act, hitherto, that if any ſheriff of any county of this realm of *England*, had at any time taken and arreſted any perſon or perſons upon any writ of *capias ad reſpondendum* iſſuing out of any court at *Weſtminſter* aforeſaid and to him directed; or if any ſheriff of *Middleſex* had at any time taken and arreſted any perſon or perſons upon any bill of *Middleſex*, iſſuing out of the court of our ſaid lord the king before the king himſelf, and to him directed; that he and they ſhould let to bail ſuch perſon or perſons ſo taken and arreſted according to the form and exigence of the ſaid act: and that ſuch ſheriff, as well from time whereof the memory of man is not to the contrary, until the time of the making of the ſaid act, as at all times after the making and publiſhing thereof, has uſed and been accuſtomed to return upon ſuch writ, or bill of *Middleſex* reſpectively, that he the ſaid ſheriff had taken the body of ſuch perſon ſo arreſted, and had his body before our lord the king or his juſtices at *Weſtminſter* reſpectively, at the day and place contained in ſuch writ or bill of *Middleſex*, according to the exigence of the ſaid writ or bill of *Middleſex*, and as by the ſaid writ or bill of *Middleſex* he was required: and if ſuch perſon ſo taken and arreſted, and let to bail according to the form of the ſaid act, did not appear at ſuch day and place contained in the writ or bill of *Middleſex*, that then ſuch ſheriff or bailiff who had made ſuch return uſed to be amerced (2) from

Averment, that it is the conſtant practice for ſheriffs to let to bail perſons arreſted by them on meſne proceſs out of any of the courts at Weſtminſter, and to return *cepi corpus* and *paratum habeo*,

and if the perſon let to bail did not appear, the ſheriff was amerced from time to time until he did appear.

(2) The ſame point is recognized by *Eyre* C. J. who ſays, "that if the "ſheriff has let the party out of priſon "upon bail, he muſt return *cepi corpus*, "and

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Demurrer.

from time to time until the ſaid perſon ſo arreſted did appear to ſuch writ or bill of *Middleſex*, and was not uſed or accuſtomed to be impleaded in the ſaid court, or in any other court for the non-appearance of ſuch perſon ſo making default, or for his ſaid return upon ſuch default, &c.

And the ſaid *Thomas Poſterne* ſays that he, by any thing by the ſaid Sir *Robert* and Sir *William* above in pleading alleged, ought not to be barred from having his ſaid action thereof againſt them the ſaid Sir *Robert* and Sir *William*, becauſe he ſays, that the plea aforeſaid by them the ſaid Sir *Robert* and Sir *William* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to bar him the ſaid *Thomas Poſterne* from having his ſaid action thereof againſt the ſaid Sir *Robert* and Sir *William*, to which ſaid plea the ſaid *Thomas* has no neceſſity, nor is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: wherefore for want of a ſufficient anſwer in this behalf, the ſaid *Thomas Poſterne* prays judgment and his damages on occaſion of the premiſes to be adjudged to him, &c. And for cauſes of demurrer in law upon the ſaid plea, the ſaid *Thomas*, according to the form of the ſtatute in ſuch caſe lately made and provided, ſhews, and to the court here ſets forth, the cauſes following, that is to ſay, for that the ſaid Sir *Robert* and Sir *William* have not ſufficiently alleged in their ſaid plea, that the bail in their ſaid plea above mentioned were ſufficient bail, but by implication and not poſitively, and for that the ſaid plea wants form, &c.

Special cauſes.

" and having made that return, he is " chargeable by the ſtatute 23 H. 6. c. " 9. to have the body of the perſon at " the day of the return according to " the courſe of the court: if he has not " the body to produce, he is to be " amerced, and then, and not until " then, he may put the bond in ſuit to " reimburſe himſelf. This is laid down " in Dalton's ſheriff, c. 37. and is the " ancient courſe of proceeding in all " caſes where the ſheriff had not the " body ready after his return of *cepi* " *corpus*, though I have not been able to trace when the mode of proceeding " by *attachment* againſt the ſheriff was " firſt ſubſtituted in the room of the " *amercement*." 2 H. Black. 434. *Bengough v. Roſſiter*. Mr. Blackſtone, in a very learned note upon this ſubject, ſuppoſes the proceeding by attachment to have been ſubſtituted at ſome period between the years 1724 and 1729. See 434. note (a.)

And the ſaid Sir *Robert Hanſon* and Sir *William Hooker* ſay, that the ſaid plea by them in manner and form aforeſaid above pleaded, and the matter in the ſame contained are good and ſufficient in law, to bar the ſaid *Thomas Poſterne* from having his ſaid action againſt them the ſaid Sir *Robert* and Sir *William*, which ſaid plea and the matter in the ſame contained, the ſaid Sir *Robert* and Sir *William* are ready to verify and prove, as the court, &c. and becauſe the ſaid *Thomas Poſterne* does not anſwer the ſaid plea, nor has hitherto in any wiſe denied the ſame, the ſaid Sir *Robert* and Sir *William*, as before, pray judgment, and that the ſaid *Thomas Poſterne* may be barred from having his ſaid action thereof againſt them the ſaid Sir *Robert* and Sir *William*, &c. But becauſe the court of our ſaid lord the king now here is not yet adviſed of giving their judgment of and upon the premiſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Saturday* next after three weeks of *St. Michael*, to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king is thereof not yet, &c.

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Joinder.

Curia adviſare vult.

Poſterne *againſt* Hanſon and Hooker ſheriffs of Middleſex.

Caſe 8.
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Trinity, 21ſt of *Charles* 2. Rol. 465.

CASE by *Poſterne* plaintiff, againſt *Hanſon* and *Hooker*, late ſheriff of *Middleſex*, defendants; the plaintiff declares and ſhews the clauſe in the ſtatute 23 H. 6. c. 9. by which it is enacted, among other things, "that if the ſaid ſheriffs "return upon any perſon *cepi corpus* or *reddidit ſe*, they "ſhall be chargeable to have the bodies of the ſaid per-"ſons at the days of the returns of the ſaid writs, bills or "warrants, in ſuch form as they were before the making of "this act;" and further ſhews, that one *Michael Drew* was indebted to him in 240l. by bond, and for the recovery thereof he had ſued out a bill of *Middleſex* out of the court, returnable

S. C. 2 Keb. 607.

A ſheriff is bound by the ſtatute 23 H. 6. c. 9. to let his priſoner, arreſted by meſne proceſs, at large upon reaſonable ſureties, and he is not ſubject to an action, although he returns *cepi corpus*. By the words in the ſtatute, "that if the "ſheriff return

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"*cepi corpus* he "shall be "chargeable to "have the body "at the day of "the return" is meant only, that he may be amerced to the king for not having the body at the day.

returnable on *Tuesday* next after three weeks of *St. Michael*, in the 18th year of the reign of the now king, by force whereof the defendants, before the return of the bill, being sheriff of *Middlesex*, took and arrested the said *Drew*, and had him in their custody, and the defendants afterwards let the said *Drew* to bail and mainprise, upon security of a bond made and entered to the said defendants, then sheriff, by the said *Drew*, and one *Allen*, and one *Lee*, for the appearance of the said *Drew*, at the return of the said bill of *Middlesex*, whereas in truth the said *Allen* and *Lee* were not reasonable sureties, nor had sufficient estates in the said county of *Middlesex*, nor did the said *Drew* appear at the return of the said bill, nor found any bail to answer the action of the plaintiff, whereby the plaintiff has lost the benefit of recovering his debt, whereupon he brought his action.

The defendants plead and shew all the said statute; the material clause for them, and which the plaintiff had omitted, being, "*that the sheriff shall let at large his prisoners on reasonable sureties of sufficient persons having sufficient within the county*;" and then they shew that the plaintiff sued out the said bill of *Middlesex*, which he delivered to them, being sheriff of *Middlesex*, and that they by force thereof had arrested the said *Drew*, and had him in their custody: but they further shew, that they let him at large upon the security of the said bond (3) of the said *Allen* and *Lee*, then having sufficient

(3) This statute consists of two branches; the first is as to the persons to be let to bail; with respect to whom it is enacted, "that sheriffs, &c. shall "let out of prison all manner of persons "arrested, or being in their custody, "by force of any writ, bill or warrant, "in any action personal, or by cause of "indictment or trespass, upon reason-"able sureties of sufficient persons hav-"ing sufficient within the counties "where such persons be so let to bail "or mainprise, to keep their days in "such place as the said writs, bills or "warrants shall require; persons being "in their ward by condemnation, exe-cution, *capias utlagatum*, or *excommu-"nicatum*, surety of the peace, or by "special commandment of any justice, "and vagabonds refusing to serve ac-"cording to the statute of labourers, "only excepted;" and the second is, as to the nature and form of the se-curity; with regard to which it is en-acted

ſufficient within the ſaid county of *Middleſex*, to wit, at *Weſtminſter* within the ſaid county; whereupon they returned *cepi corpus* at the return of the ſaid bill of *Middleſex*, as according to law and practice they ought; and there are ſeveral other averments not very material, and ſo conclude their plea

acted, "that no ſheriff, &c. ſhall take "any obligation for any cauſe aforeſaid, or by color of their office, but "only to themſelves of any perſon, nor "by any perſon, who ſhall be in their "ward by courſe of law, but by the "name of their office, and upon condition written, that the priſoners "ſhall appear at the day and place "contained in the writ, bill or warrant; and if any ſheriff, &c. take "any obligation in other form, it ſhall "be void." Upon the firſt branch of the ſtatute, it was determined in the court of king's bench. 4 Term Rep. 505. *Bengough* v. *Roſſiter*, and the determination afterwards affirmed in error in the exchequer chamber by all the judges of that court, except *Eyre* C. J. 2 H. Black. 418. that the ſheriff has no authority to take a bond for the appearance of perſons arreſted by him under proceſs iſſuing upon *an indictment* at the quarter ſeſſions for a miſdemeanor; but only a *recognizance* for their appearance. It has alſo been reſolved by all the judges, (contrary to what had been determined before in the court of K. B. 1 Ld. Raym. 722. *Rex* v. *Dawes*. S.C. 2 Salk. 608) that the ſheriff cannot take bail on an attachment for a contempt, though a judge at his chambers may, 1 Str. 479. *Anon.* S. P. Com. Rep. 264. *Field* v. *Workhouſe*, nor on an attachment out of chancery, for the ſtatute refers only to proceſs in courts of common law. 1 H. Black. 468. *Studd* v. *Acton*. But the defendant to a declaration on ſuch a bail bond, after ſetting out the condition on oyer, by which it appears to have been taken on an attachment for a contempt, muſt not demur; for if he do, the court will not preſume the ſheriff had not any authority to take bail, but muſt plead the ſtatute 23 H. 6. and ſtate thoſe facts of the caſe which will bring the queſtion before the court. 2 Vent. 234—238. *Lawſon* v. *Haddock*. Com. Rep. 264. *Field* v. *Workhouſe*. 2 Black. Rep. 945. *Say* v. *Ellis*.

It is held not to be neceſſary, in an action upon a bail bond, to ſtate that the defendant in the original action was *arreſted*, and if ſtated, it is not traverſable; for the words of the ſtatute 4 Ann. c. 16. ſ. 20. viz. "and the ſheriff taketh bail from ſuch perſon "*againſt whom ſuch writ, bill or proceſs is taken out*," are general enough to include the caſe where the party has not been arreſted; and beſides it would be attended with miſchievous conſequence to ſet aſide bail bonds taken civilly without expoſing the party to an arreſt. 1 Str. 444. *Watkins* v. *Parry*. Ibid. 643. *Haley* v. *Fitzgerald*.

The nature and form of the ſecurity required by the ſecond branch of the ſtatute, is *by bond*; therefore *an agreement in writing*, made by a third perſon with the bailiff of the ſheriff, to put in good

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plea in bar of the action: to which plea the plaintiff demurs in law.

And it was argued for the plaintiff, that the action might well be maintained upon the clauſe of the ſtatute, "that if "the ſheriff return a *cepi corpus* or *reddidit ſe*, &c. he ſhall be "charge-

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good bail, for a perſon arreſted on meſne proceſs, on or before the return of the writ, or to ſurrender the body to the bailiff, or on default thereof to pay debt and coſts, in conſideration of his diſcharging the party arreſted, is held to be void. Indeed if the ſecurity had been *by bond* it would be void, becauſe it has been adjudged that the ſtatute requires the bond to be made to the *ſheriff himſelf as ſuch* by his name of office, and not to the ſheriff's *bailiffs*; for though the ſtatute mentions *the bailiff* of a franchiſe, it means thoſe officers who have the return of proceſs; but where it is directed to the ſheriff, the bond muſt be made to him. And the condition of the bond muſt be for the appearance of the party at the return of the writ, and for no other purpoſe; ſo that if there be any other condition expreſſed in the bond, or the bond be ſingle without any condition at all, or be with an impoſſible one, the bond is void by the ſtatute. 1 Term Rep. 418. *Rogers* v. *Reeves*. Cro. Eliz. 862. *Cotton* v. *Wale*. Ibid. 672. *Scryven* v. *Dyther*. Dyer, 119. 120. 10 Rep. 100. a. b. 101. a. *Beawſage*'s caſe. 3 Lev. 74. 75. *Graham* v. *Crawſhaw*. 1 Str. 399. *Mills* v. *Bond*. S. C. Fort, 363. 2 Term Rep. 569. *Samuel* v. *Evans*. But the ſtatute is confined to obligations given *to the ſheriff*, and does not extend to ſuch as are given to, or for the benefit of, *the plaintiff*. Therefore where an attorney undertakes to appear for the defendant, he is bound to do ſo, and the court will enforce a performance of ſuch his contract with the plaintiff, by attachment, though his undertaking be not in the form preſcribed by the ſtatute. Cro. Eliz. 190. *Milward* v. *Clerk*. 1 Sid. 132. *Benſkin* v. *French*. S. C. 1 Lev. 98. 1 Term. Rep. 422. *Rogers* v. *Reeves*. So a bond given *to the plaintiff* in another form than that which the ſtatute preſcribes is valid; the diſtinction being where the undertaking is to the *plaintiff* and where it is made to the *ſheriff*. 2 Mod. 304. 305. *Hall* v. *Carter*. If it appear on the face of the declaration, or upon oyer, that the bond is void by the proviſions of the ſtatute, the defendant may demur; but if it do not he muſt plead the ſtatute; or, if by pleading or otherwiſe, the objection appears in any part of the record, he may move in arreſt of judgment, 2 Term Rep. 575. *Samuel* v. *Evans*. If the bond was in truth made to the ſheriff *as ſuch*, but by miſtake he declares as upon a common bond, and the defendant prays oyer of the bond, and ſays "it is read to him, &c." without ſetting it out, and then prays oyer of the condition, which he ſets out at large *in hæc verba*, whereby it appears to be a bail bond, and pleads the ſtatute 23 H. 6. and that the bond was given for eaſe and favor, the plea will *primâ facie*

"chargeable to have the bodies, &c." and here the defendants have let the priſoner at large, and returned *cepi corpus*, therefore by the expreſs words of the ſtatute they are chargeable with the body of the priſoner. For before the making of the ſtatute, if the ſheriff had taken a priſoner by writ, and let

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If a ſheriff before the ſtatute 23 H. 6. had arreſted a perſon upon meſne pro-

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facie be an anſwer to the action, becauſe it is not alleged that the bond was made to the plaintiff as ſheriff; but the plaintiff may make his declaration good in his replication, by praying that the bond may be enrolled, and then ſetting it out at large, and averring that he was ſheriff, &c. the arreſt of the defendant, &c. and that the bond was made to him as ſheriff, and traverſing the eaſe and favor. Carth. 301. 302. *Abney* v. *White*. See the form of doing of it, 1 Lutw. 680. 685. *Blewet* v. *Appleby*. See alſo 1 Saund. 9. 6. *Jevons* v. *Harridge*, note (1.) The bond muſt alſo be taken by the ſheriff *before* the return of the writ, otherwiſe it is void. 1 Ld. Raym. 352. *Pullein* v. *Benſon*.

But it is not required by the ſtatute to inſert the nature of the action in the condition of the bond; if it ſets forth the parties, and the time and place of appearance ſubſtantially, it is ſufficient: therefore a mere informality, or variance between the condition and proceſs, in the deſcription of the action, or of the time and place of appearance, does not vitiate the bond. Thus where the condition was to anſwer the plaintiff in a plea of debt *generally*, but the writ was to anſwer the plaintiff in a plea of debt [illegible] the variance was held not to be material. Cro. Jac. 286. *Villiers* v. *Hastings*. So where the *latitat* was to anſwer the plaintiff *in a plea of treſpaſs*, and the condition was to anſwer the plaintiff *generally*, without mentioning any plea, it was held to be no objection; for no other action ſhall be intended, the ſtatute only requiring an appearance, and not the words *ad reſpondendum*, &c. which are mere ſurpluſage. 2 Lev. 123. 124. *Kirkebridge* v. *Wilſon*. So where the condition was to appear in treſpaſs of 100l. but the writ was in a plea of treſpaſs, *and alſo to a bill of debt of* 100l. the bond was held good; for by *Holt* C. J. the appearance, the day, the court and the party at whoſe ſuit, &c. are well expreſſed as they ſhould be. 2 Show. 51. *Gardiner* v. *Dudgate*. And where the writ was to anſwer the plaintiff in a plea of treſpaſs, *and alſo to a bill for* 100l. *of debt*, and the condition was to anſwer in a plea of treſpaſs of 100l. the variance was held to be immaterial. Sir T. Jones, 137. 138. *Cudwell* v. *Dunkin*. So where a writ was in a plea of treſpaſs, *and alſo to a bill*, and the condition was in a plea of treſpaſs only, the bond was nevertheleſs held good. 6 Mod. 122. *Grovenor* v. *Soame*. So an objection, that in the condition of the bail bond it was not ſaid *whoſe bill* the defendant was to anſwer, was over-ruled, and *Parker* C. J. ſaid, that the ſtatute only requires that the ſheriff ſhould take a bond conditioned for the appearance of the party ſuch a day at *Weſtminſter*; it does not ſay even to anſwer the plaintiff.

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ceſs, and let him at large, and afterwards returned *cepi corpus*, he

let him at large, and afterwards returned *cepi corpus*, it is clear that he was chargeable to the action of the party, either for an eſcape or for a falſe return, at the election of the party grieved (4); ſo it was concluded it ſhould in the preſent caſe.

But

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tiff. 10 Mod 327. *Rench* v. *Britton*. So where the proceſs was in an action *of trover*, and the condition was to appear to anſwer in a plea *of treſpaſs on the caſe upon promiſes*; though it was urged to be at variance, the court ſaid "*the reſpondendum* is only ſurpluſage, "and ſhall be rejected." Fort. 368. *Davenport* v. *Parker*. And where the ſheriff, upon an original writ in a plea of treſpaſs *upon the caſe upon promiſes*, took a bail bond conditioned for the defendant's appearance in a plea of *treſpaſs*, the court held it to be valid. 6 Term Rep. 702. *Owen* v. *Nail*. It ſhould ſeem therefore from theſe authorities, that the caſe of *More* v. *Finch*. 2 Lev. 177. where it was held, that the bond was void becauſe the condition did not ſtate *whoſe bill* the defendant was to anſwer, is not law. So with reſpect to the *place of appearance*, it has been adjudged that the condition of the bond for the defendant to appear *before his majeſty's juſtices of the king's bench* at *Weſtminſter* was no variance from the writ, which was to appear *before our lord the king at Weſtminſter*. 2 Lev. 180. *Kirkhide* v. *Dyke*. S. P. 2 Vent. 237. *Lawſon* v. *Haddock*. And where the writ by original was returnable before our lord the king, *whereſoever he ſhould then be in England*, and the condition was without the words *whereſoever*, &c. the court ſaid that there are no ſet forms of words for thoſe bonds, but if in ſubſtance they are to appear according to the deſign of the writ, it was ſufficient: and they cited a caſe, where the condition of the bond was to appear in the office of pleas in the court of exchequer at *Weſtminſter*, and held well, though the proceſs was to appear before the barons, and that they would underſtand that by appearing before the king, was meant before the king in his court, and not before the king in his perſon, and judgment was given for the plaintiff. 2 Str. 1155. *Shuttleworth* v. *Pilkington*. S. C. cited in 1 Term Rep. 240. *King* v. *Pippett*.

If the defendant does not appear at the return of the writ according to the condition; that is, if he does not put in and perfect bail above in due time, the bail bond is forfeited; and the plaintiff may either take an aſſignment of it, or proceed againſt the ſheriff to compel *him* to return the writ, and bring in the body of the defendant, or in other words to put in and perfect bail. If the bail below are ſufficient, it is uſual for the plaintiff to take an aſſignment of the bail bond, which it ſeems, he cannot do after ſervice of the rule to bring in the body, becauſe he has made his election to proceed againſt the ſheriff. Imp. K. B. 126. 127. 4th edit. But if the plaintiff takes an aſſignment of the bail bond, he diſcharges the ſheriff, and the court will not grant a rule upon him to return the writ. Gilb. C. P. 21. 1 Salk.

99.

But it was answered and resolved by the court, that the action does not lie, because now the sheriff is compellable by the statute to let the prisoner at large, upon reasonable sureties, &c. (5); therefore when the law compels the sheriff to do so, he shall not be subject to an action for doing his duty in obedience to the law. And though in the time of the late disorder, there was an opinion that such action lies, yet the court altogether condemned such opinion, and said, that the law was clearly otherwise (6). And as to the clause of the statute, that if the sheriff return *cepi corpus*, he shall be chargeable to have the body, &c. it is to be understood that the sheriff may be (7) amerced for not having the body at the day; and because he is liable to be amerced to the king for not having the body, the statute gives him advice that the sureties shall have sufficient within the county for his indemnity. And at common law if the sheriff had arrested any man by the king's writ, the prisoner could only be delivered by writ *de homine replegiando*, as *Twysden* justice said, and as the law seems to be (8); and if the sheriff had arrested a prisoner, and detained him in his custody, and, at the day of the return of the writ, returned *cepi corpus*, but had not the body in court, the sheriff would have been amerced; but the party could not have maintained an action against him; so now the statute compelling him to let the prisoner at large upon reasonable sureties, &c. and if he do so, as it is averred in his plea he did, he shall be in the same condition as if at common law he had detained the prisoner in his custody, and shall only be amerced to the king for not having the body of the prisoner, as he would have been before the statute, when he kept the prisoner in his custody. Wherefore it was adjudged for the defendants by the whole court. *Winnington* for the plaintiff; *Saunders* for the defendants.

was liable to an action either for an escape or for a false return.

The sheriff is bound by the statute to let a prisoner at large, on reasonable sureties, and therefore not liable to an action for so doing.

If the sheriff return *cepi corpus*, but has not the body at the day, he is to be amerced.

At the common law a person arrested by writ could only be delivered by writ *de homine replegiando*, and if the sheriff detained him and returned *cepi corpus*, but had not his body in court at the return of the writ, he was amerced. So it is now since the statute.

Note—It was agreed by the whole court, that the averment by these words, namely (c), "the said *Obedia Allen* and *Richard* "*Lee having* (a) sufficient within the said county, to wit, at "*Westminster* aforesaid, &c." was as well as if it had been by the words "*That* the said *Obedia Allen* and *Richard Lee had* sufficient within the said county, &c. (9).

The words "*O.* "*and R. having* "*sufficient*" are as good words of averment as "*that the said* "*O. and R. had* "*sufficient.*"

(c) See p. 55.

[(a) 61]

99. *Etherick* v. *Cowper*. 1 Wilf. 223. *Ld. Brooke* v. *Stone*. So by taking such assignment, if the bail to the sheriff become bail above, the plaintiff cannot except

except to them, for the acceptance of the aſſignment is an admiſſion of the ſufficiency of the bail. 1 Salk. 97. *Anon.* 7 Mod. 62. *Fiſh* v. *Horner*. Ibid. 117. *How* v. *Granville*. 6 Mod. 122. *Grovenor* v. *Soame*. By ſtatute 4 Ann. c. 16. ſ. 20. it is enacted, "that if any "perſon ſhall be arreſted by any writ, "bill or proceſs iſſuing out of any of "the courts of record at *Weſtminſter*, "at the ſuit of any common perſon, and "the ſheriff or other officer taketh bail "from ſuch perſon againſt whom ſuch "writ, bill or proceſs is taken out, the "ſheriff or other officer at the requeſt "and coſts of the plaintiff in ſuch action "or ſuit, or his lawful attorney, ſhall "aſſign to the plaintiff in ſuch action "the bail bond, or other ſecurity, taken "from ſuch bail, by endorſing the ſame, "and atteſting it under his hand and "ſeal in the preſence of two or more "credible witneſſes, which may be done "without any ſtamp, provided the aſ-"ſignment ſo endorſed be duly ſtampt "before any action be brought there-"upon; and if the ſaid bail bond, or "aſſignment, or other ſecurity taken for "bail, be forfeited, the plaintiff in ſuch "action, after ſuch aſſignment made, "may bring an action and ſuit there-"upon in his own name, and the court, "where the action is brought, may by "rule or rules of the ſame court, give "ſuch relief to the plaintiff and defen-"dant in the original action, and to "the bail upon the ſaid bond or other "ſecurity taken from ſuch bail, as is "agreeable to juſtice and reaſon, and "that ſuch rule or rules of the ſaid "court ſhall have the nature and effect "of a defeaſance to ſuch bail bond or "other ſecurity for bail." This ſtatute is compulſory upon the ſheriff to aſſign the bail bond at the requeſt of the party, and if he refuſes, he is liable to an action upon the caſe. 7 Term Rep. 122. *Stamper* v. *Milbourne*. According to the practice of the court of K. B. if the defendant neglects to put in and perfect bail above, and the plaintiff does not declare in the original action within *two* terms after the return of the writ, he is not held to be out of court, but may ſtill take an aſſignment of the bail bond, for he is not bound to declare *de bene eſſe* within the time limited for the defendant's appearance, and *after* that time he cannot declare until the defendant has actually appeared. 2 Str. 1262. *Merryman* v. *Carpenter*. Tidd's K. B. 156. 2d edit.; but in the C. B. the practice is otherwiſe; for it is held to be the ſettled practice of that court, that if the plaintiff does not declare within two terms, that is, before the eſſoin day of the third term *inclusive*, after the return of the writ, he is out of court, and therefore cannot take an aſſignment of the bail bond, for that by the found conſtruction of the ſtatute of Anne, the ſuit muſt be depending when the bail bond is aſſigned. 2 Black. Rep. 876. 877. *Sparrow* v. *Naylor*.

It is held that the aſſignment may be made by the under-ſheriff *in the name of the high-ſheriff*, as well as by the high-ſheriff himſelf, but not by the under-ſheriff's *clerk*. 1 Str. 60. *Kilſon* v. *Fagg*. S. C. 10 Mod. 288. And the action may be brought in any county in which the aſſignment is ſtated to be made; as if the bail bond be given to the ſheriff of S. the aſſignment may be ſtated to be made in the county of B. or any other county, and the venue laid there. 2 Str. 727. *Gregſon* v. *Heather*. S. C. 2 Ld. Raym. 1455. And the aſſignee muſt bring the action in the *ſame* court out of which the proceſs iſ-

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fued, on which the bail bond is taken; for this is neceſſary in order to give the parties the relief intended by the ſtatute. 1 Burr. 642. *Cheſterton* v. *Middleburſt.* 3 Burr. 1923. *Walton* v. *Bent.* 3 Wilſ. 348. *Morris* v. *Ree.* 2 Black. Rep. 838. S. C. Ibid. 877. S. P. but the ſheriff himſelf may ſue on the bond in any other court. 1 H. Black. 631. *Newman* v. *Faucett.* However, the court of king's bench decided that the action on the bail bond, whether brought by the ſheriff, or other officer, to whom it was given, or by the aſſignee, muſt be commenced in the court where the original action was brought, aſſigning as a reaſon that the ſtatute of Anne gives the power of relief in one caſe as well as in the other. 8 Term Rep. 152. *Donatty* v. *Barclay.* The ſheriff, or the aſſignee of the bail bond, cannot hold to bail, either the defendant, or his bail, in an action brought by either of them, on that bond. 6 Term Rep. 336. *Brander* v. *Roſſon.* 8 Term Rep. 450. *Melliſh* v. *Petherick:* But if the ſheriff or aſſignee recover judgment againſt the defendant, or his bail, in the action on the bail bond, they may be holden to bail in an action on the judgment. 8 Term Rep. 85. *Prendergaſt* v. *Davis.* It is held ſufficient for the aſſignee of the bail bond to ſtate in his declaration that the ſheriff aſſigned the bond to him *according to the form of the ſtatute*, without adding, "that the aſſignment was "under the hand and ſeal of the ſhe-"riff." Willes's Rep. 408. *Dawes* v. *Papworth.* And the defendant may plead *that he did not aſſign*, &c. *according to the form of the ſtatute*, and the plaintiff may tender an iſſue on it in thoſe words. Ibid. On which he muſt prove that the aſſignment was, according to the ſtatute, under the hand and ſeal of the ſheriff. Ibid. The bail to the ſheriff are liable to ſatisfy the whole debt due to the plaintiff to the full extent of the penalty of the bond, though beyond the ſum ſworn to, and coſts. See 2 Ld. Raym. 1564. *Miſſlin* v. *Morgan.* Cowp. 71. *Orton* v. *Vincent.* 1 H. Black. 76. *Mitchell* v. *Gibbons.* And each of them is liable for his own coſts, as well as thoſe of the original action. And where *ſeveral* actions are brought, it is uſual, in ſuing out execution, to apportion the debt and coſts in the original action amongſt the different defendants, ſo that a part may be levied on each, together with his own coſts. Tidd P. K. B. 159. 2d edit. If the defendant does not juſtify bail in four days *excluſive* after notice of exception to them, the plaintiff may take an aſſignment of the bail bond; but if the fourth day be the laſt day of the term, and the defendant do not juſtify his bail before the riſing of the court, the plaintiff may take an aſſignment of the bail bond on that day after the riſing of the court. 8 Term Rep. 4. *Dent* v. *Weſton.*

If the *plaintiff* die after the arreſt, and before the return of the writ, the court will ſet aſide the proceedings on the bail bond. 8 Mod. 240. *Hutchinſon* v. *Smith.* And where the *defendant* dies before the plaintiff could have had judgment againſt him, if there has been no delay in putting in and perfecting bail, the court will ſtay proceedings on the bail bond upon payment of coſts only: but where the plaintiff might have had judgment againſt the defendant, if bail above had been put in and perfected in time, the bail to the ſheriff are liable for the whole debt and coſts, and the court will not relieve them. Cowp. 71. *Orton* v. *Vincent.* Where the defendant becomes a *bankrupt* after he has given a

bail bond, the bail are not diſcharged unleſs he obtains his certificate *before* they are fixed, for if he obtains his certificate *afterward*, they remain liable. 1 Burr. 244. *Wolley* v. *Cobbe*. Ibid. 436. *Cockerill* v. *Owſton*. If the defendant ſurrender himſelf to the ſheriff before the return of the writ, the bond may be cancelled, after which the plaintiff can neither proceed againſt the ſheriff, nor maintain an action againſt him for not aſſigning it. 6 Term Rep. 753. *Jones* v. *Lander*. 7 Term Rep. 102. *Stamper* v. *Milbourne*. And where the bail ſurrender the principal after the aſſignment of the bail bond without juſtifying, and after the expiration of the time allowed them to juſtify, the court will ſtay the proceedings on payment of coſts. 5 Term Rep. 401. *Edwin* v. *Allen*. Ibid. 434. *Meyſey* v. *Carnell*. 7 Term Rep. 297. *Hardwick* v. *Bluck*.

(4) S. P. 1 Sid. 23. *Allen* v. *Robinſon*. This muſt be underſtood to mean, where the defendant does not put in, and juſtify, bail at all; for in a late caſe where the ſheriff permitted the party to go at large, *without taking a bail bond*, and returned *cepi corpus*, and, before the expiration of the rule to bring in the body, put in bail, it was held that he was not liable to an action, either for an eſcape, or falſe return. That was an action againſt the ſheriff of *Kent*, in which the firſt count of the declaration ſtated that the defendant had arreſted one W. J. S. and ſuffered him to eſcape, and falſely returned *cepi corpus*, and another count ſtated that the defendant neglected to arreſt the ſaid W. J. S., and falſely returned *cepi corpus*: and on the general iſſue pleaded, it appeared in evidence that the defendant had actually arreſted W. J. S. but afterwards permitted him to be at large without having taken a bail bond, and the plaintiff on the return day ruled the defendant to return the writ, who returned *cepi corpus*, and the defendant being ſerved with a rule to bring in the body, put in bail, and W. J. S. before the expiration of the latter rule ſurrendered himſelf in diſcharge of thoſe bail; it was adjudged that bail having been put in within due time was an anſwer to the action, the object of ruling the ſheriff to return the writ being, to aſcertain whether he has arreſted the party or not, and if he return *cepi corpus* he muſt put in bail; that, if the action could be maintained, it would in fact be going to a jury to aſcertain *whether the court has done right in giving the ſheriff the uſual time to put in bail*; it was a ſufficient anſwer to the action *that an appearance was entered*; that in this caſe in Saunders it was ſaid by the court, that if the ſheriff take a priſoner, and detain him in his cuſtody, and at the return of the writ return *cepi corpus*, and have not the body in court, he ſhall be amerced, but the party ſhall not have an action againſt him. 2 Boſ. and Pull 35. *Pariente* v. *Plumptree*. But where the ſheriff, who permits the party to go at large without taking a bail bond, has him not at the return of the writ, or in other words, *does not put in and perfect bail within due time*, it is a breach of his duty, for which he is anſwerable in an action for an eſcape. 7 Term Rep. 109. *Fuller* v. *Preſt*. 1 Boſ. and Pull. 225. *Webb* v. *Matthew*. 2 Term Rep. 176. 177. *Atkinſon* v. *Matteſon*.

(5) And therefore if the defendant tender a bail bond with ſufficient ſureties, and the ſheriff refuſe to accept it, he is liable to a ſpecial action on *the caſe*,

caſe, but not to an action of treſpaſs, for the refuſal does not make him a treſpaſſer *ab initio*. Cro. Car. 196. *Salmon* v. *Percivall*. Sir W. Jones, 226. 2 Roll. Abr. 561. pl. 9. S. C. Dalt. Sheriffs, 356. 2 Vent. 96. *Bealy* v. *Sampſon*. 1 Sid. 22 *Allen* v. *Robinſon*. 2 Salk. 609. *Rex* v. *Barlow*. 2 Mod. 31. *Smith* v. *Hall*. Ibid. 84. *Page* v. *Tulſe*. And the action does not lie againſt the *bailiff* who refuſes, but it muſt be brought againſt the ſheriff. 2 Mod. 32. *Smith* v. *Hall*. The clauſe in the ſtatute, which requires reaſonable ſureties, was introduced for the benefit of the ſheriff, and therefore though he may inſiſt upon two ſureties, yet he may take a bond with one ſurety only. Sir *W. Drury*'s caſe cited 10 Rep. 100. b. 101. a. *Beawſage*'s caſe. Cro. Eliz. 808. *Clyſton* v. *Web*. Ibid. 852. *Blackbourn* v. *Michelbourn*. Ibid. 852. *Cotton* v. *Wale*. Fort. 369. *Cock* v. *Brookhurſt*.

(6) S. P. Cro. Eliz. 624. *Barton* v. *Aldeworth*. 1 Roll Abr. 92. pl. 11. 93. pl. 17. Ibid. 807. (D) pl. 4. *Moor*, 428. *Laughton* v. *Gardner*. 1 Sid. 22. 23. *Allen* v. *Robinſon*. Ibid 439. *Parker* v. *Welby*. Poſt. 154. *Bunſon* v. *Welby*. 1 Vent. 55. *Anon*. Ibid. 85. *Parker* v. *Welby*. 1 Mod. 227. *Ellis* v. *Tarborough*. 2 Mod. 177. S. C. 6 Mod. 122. *Grovenor* v. *Soame*. 10 Mod. 288. *Kitton* v. *Fag*. 1 Mod. 240. 244. *Page* v. *Tulſe*. 2 Mod. 83. S. C. 1 Lev. 86. *Bentley* v. *Hore*. Gilb. H. C. P. 22. 3d edit. *Etherick* v. *Cowper*. 1 Ld. Rayn. 425. and 1 Salk 99. in which what Lord *Holt* is made to ſay, that if the ſheriff takes inſufficient bail, he is liable to an action, as well as to amercements, is not law, and is noticed by *Salkeld* to be contrary to the caſe of *Grovenor* v. *Soame*, where it was adjudged, that no action lies againſt the ſheriff for taking inſufficient bail, but he ſhall be amerced if he has not the body.

(7) If the plaintiff chooſes to proceed againſt the ſheriff, rather than take an aſſignment of the bail bond, he muſt ſue out a rule upon him to return the writ. This rule expires in *four* days next after the ſervice of the rule, in *London* and *Middleſex*, and in ſix days after, in any other county or city, and is obtained in K. B. from the clerk of the rules, and in C. B. from the ſecondaries: and is uſually taken out on the return day of the writ by bill in K. B. and on the firſt day of the term, or *quarto die poſt* of any other return in C. B. and in K. B. where the proceeding is by original, in order to keep pace with the time to put in bail; but it cannot be taken out before that time, though teſted in term time, and if it be it is irregular, and an attachment grounded upon it will be ſet aſide. 1 Term Rep. 552. *The King* v. *Sheriff of Cornwall*. However, as we already obſerved (note 3), this rule cannot be had after the plaintiff has taken an aſſignment of the bail bond, if it be valid; for if it be a void bond, as having been executed after the return of the writ, or the like, 2 Term Rep. 569. *Samuel* v. *Evans*, the ſheriff may, notwithſtanding ſuch aſſignment, be ruled to return the writ. 1 Wilſ. 223. *Lord Brooke* v. *Stone*. Nor can this rule be taken out where the writ was executed by a *ſpecial* bailiff nominated by the plaintiff, or his agent. 2 Black. Rep. 952. *Hamilton* v. *Dalziel*, whether it be a writ of execution, or on meſne proceſs. 4 Term Rep. 119. *De Moranda*

randa v. *Dunkin.* As the object of this rule is to bring the ſheriff into contempt, it muſt be ſerved *perſonally* either on him, or his under-ſheriff; ſervice on the under-ſheriff's agent in *London* has been held to be inſufficient: for as ſix days only are allowed, after the ſervice of the rule, to return the writ, it might be impoſſible to obey the rule in diſtant counties, if ſervice on the *agent* were ſufficient. Doug. 420. *The King* v. *Coles.* But in *London*, *Middleſex*, and *Surry*, a ſervice on the under-ſheriff's agent is held to be ſufficient; and the reaſon aſſigned is, becauſe the *offices* of the agents for the under-ſheriffs of thoſe counties are conſidered as the offices of the under-ſheriffs themſelves; but in theſe caſes if the rule be ſerved on the agent any where *except at the office*, the ſervice will be bad. Ibid. If the ſheriff does not return the writ, the court will upon an affidavit, ſtating that the deponent perſonally ſerved A. B. who acts as under-ſheriffs, with a copy of the rule, and *at the ſame time ſhewed him the original.* (which words in italics are held to be eſſential, 3 Term Rep. 351. *The King* v. *Smithies*,) and that the writ was not filed, grant an attachment againſt him. If he does return the writ, he muſt do ſo on the day on which the rule for returning it expires, and on default thereof, the plaintiff may move for an attachment on the next day. 4 Term Rep. 496.

The ſheriff, having arreſted the party, and let him go at large on bail, muſt return *cepi corpus*, and if bail above be not put in, and perfected, the next ſtep for the plaintiff to take is, to rule the ſheriff to bring in the body. This rule too expires in four days after ſervice, in *London* and *Middleſex*, and in ſix days after, in every other county, like the rule to return the writ, and muſt be ſerved in the ſame manner as that rule is. The object of the rule to bring in the body is to compel the ſheriff, when the defendant is at large, to put in and perfect bail above. 1 Wilſ. 262. *Wolfe* v. *Collingwood.* It muſt not be taken out until the day *after* the expiration of the rule to return the writ; if it be, the attachment founded upon it will be irregular. 5 Term Rep. 479. *Hutchins* v. *Hird.* Nor until the time for putting in bail has expired. 2 H. Black. 276. *Rolfe* v. *Steele.* For if thoſe rules be taken out before, it may happen that the defendant will juſtify his bail after the ſheriff is fixed with the debt and coſt, whereby the ſheriff will be without remedy, for if he brings an action on the bail bond againſt the defendant or his bail, they may plead *comperuit ad diem*, and ſo defeat the action. *Spicer* v. *Linnell.* Eaſt, 23. Geo. 3. C. P. Imp. K. B. 159.

The ſheriff being thus called upon to bring in the body, muſt either bring it into court, or put in and perfect bail, above, within the time allowed him by the rule. 1 Wilſ. 262. *Wolfe* v. *Collingwood.* If he do not, it is now conſidered as a contempt, for which the court will, on an affidavit of the ſervice of the rule, and that no bail has been put in, or that bail has been put in, but not perfected, grant an attachment; though formerly, we have ſeen the practice was to *amerce* the ſheriff: ſee *ante* note (z.) The ſheriff has the whole of the day, on which the rule to bring in the body expires, to bring it in, therefore the contempt is not incurred till that day be paſt, and of courſe an attachment cannot be moved for until the next day.

If

If the ſheriff is called upon in due time after he goes out of office *to return the writ*, and neglects to do ſo, he is liable, by the practice of both courts, to an attachment. So he always was in C. B. if he neglected *to bring in the body* after being ſerved with a rule for that purpoſe; however in K. B. the practice till lately was to proceed againſt him *by diſtringas* for not bringing in the body. But now by rule of that court, Trin. 31 Geo. 3. where any ſheriff before his going out of office ſhall arreſt any defendant, and *capi corpus* ſhall be returned, he ſhall and may, within the time allowed by law, be called upon to *bring in the body* by a rule for that purpoſe, notwithſtanding he may be out of office before ſuch rule ſhall be granted. 4 Term Rep. 379. The ſheriff cannot be diſcharged from the attachment for not bringing the body, but upon payment of *the whole debt* and coſts, and not merely of *the ſum ſworn* to, and coſts. 7 Term Rep. 370. *Keppel* v. *King*. 1 H. Black. 233. *Fowlds* v. *Mackintoſh*. And he muſt then have recourſe againſt the bail by putting the bail bond in ſuit, againſt them; though in general he is reimburſed by his officer, and he brings the action in the ſheriff's name. If the ſheriff be in contempt for not bringing in the body, and then the defendant dies, an attachment may iſſue againſt him afterwards for the prior contempt, though the original cauſe abated by the defendant's death. 3 Term Rep. 133. *The King* v. *Sheriff of Middleſex*.

The attachment is often ſet aſide by the favour of the court upon terms, in order to let in a trial of the merits; thoſe terms vary with the circumſtances; if the plaintiff has not loſt a trial, the court will ſet aſide the proceedings upon putting in and perfecting bail above, and payment of coſts. 4 Term Rep. 352. *Hill* v. *Bolt*. But if a trial has been loſt, the court will further require that the attachment ſhall remain in the office, and ſtand as a ſecurity for the ſum recovered. If the application be made on behalf of the defendant, it is neceſſary that there ſhould be an affidavit of the merits; or if made by the ſheriff, though it cannot be expected that he ſhould ſwear to merits, the court will require an affidavit that the application originated from him, and was not made in colluſion with the defendant in the cauſe. 7 Term Rep. 239. *The King* v. *Sheriff of Surry*. But the court will not relieve him, either by ſetting aſide the attachment, or by ſtaying proceedings in an action for an eſcape, if he has been guilty of a breach of duty, in diſcharging the defendant out of cuſtody, without the plaintiff's conſent, upon his *own* undertaking to appear and put in bail, inſtead of taking a bail bond. 7 Term Rep. 239, and 109. *Fuller* v. *Preſt*.

(8) S. P. F. N. B. 565. B. 7th edit. But, it ſeems, he might have taken bail of his own accord. Gilb. H. C P. 20 21. 3d edit. 1 Vent. 55. *Anon.* Ibid. 85. *Parker* v. *Welby*. This arbitrary power produced, as might naturally be expected, great extortion and oppreſſion of the ſubject. 2 Mod. 180. *Ellis* v. *Yarborough*. Therefore the ſtatute was made to compel ſheriffs in future to take bail in thoſe caſes where they might have taken bail, and neglected or refuſed to do ſo. 4 Term Rep. 508. *Bengough* v. *Roſſiter*. For the nature of the writ of *homine replegiando*, ſee 2 Lill. P. R. 23. 1 Atk.

633. *Treblecock's* caſe. 3 Black. Comm. 129.

(9) So where it was ſtated that A. demiſed to B. who entered, and was poſſeſſed, the reverſion thereof *belonging to the ſaid A* this was held to be a ſufficient averment that A. had the reverſion. 1 Salk. 13. *Hicks* v. *Downling*. So where in treſpaſs for his horſe, the defendant pleaded, that P. was owner of the horſe which ſtrayed out of his poſſeſſion, and came to the hands of the plaintiff, and the defendant, by the command of P. demanded the horſe within the year, *proferendo ſatisfactionem*, it was held, that this is a direct affirmation that he tendered amends, like the caſe of *warrantizando vendidit*, where the participle affirms as directly as the verb; ſo *dans plagam mortalem* is well enough. 5 Rep. 120 *Long*'s caſe. 2 Salk. 686. *Henly* v. *Walſh*. So any words, which imply ſuch a matter to be ſo, are ſufficient; as if it be pleaded that A. was ſeiſed in fee, and died and the *land deſcended* to B as his ſon and heir, this was held to be a ſufficient averment that he died ſeiſed, tho' it be not ſaid in expreſs words *that he died ſo thereof ſeiſed*; for otherwiſe it could not deſcend to B. as his heir. 2 Lutw. 1172. *Hill* v. *Bolton*. See 1 Saund. 117. *Cutler* v. *Southern*, note (4).

Caſe 9.

Hodſden *againſt* Harridge.

Michaelmas, 22d of King *Charles* the 2d. Roll. 554.

LONDON, to wit. Be it remembered, that heretofore, to wit, in Eaſter term laſt paſt, before our lord the king at *Weſtminſter*, came *Jaſper Hodſden*, by *Charles Ballet* his attorney, and brought here into the court of our lord the king then there, his certain bill againſt *Rowland Harridge*, in the cuſtody of the marſhal, &c. of a plea of debt, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, that is to ſay: *London*, to wit, *Jaſper Hodſden* complains of *Rowland Harridge*, being in the cuſtody of the marſhal of the marſhalſea of our lord the king, before the king himſelf, of a plea, that he render to him 15l. of lawful money of *England*, which he owes to and unjuſtly detains from him, for this, to wit, that whereas divers diſputes and controverſies were had and moved between the ſaid *Jaſper* and the ſaid *Rowland*, touching and concerning certain ſums of money

Debt on an award;

diſputes between plaintiff and defendant about ſome malt,

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who mutually ſubmitted themſelves to the award of T. W. and R. L.

due from the ſaid *Rowland* to the ſaid *Jaſper, for malt* (1) *before that time ſold and delivered* by the ſaid *Jaſper* to the ſaid *Rowland.* And whereas alſo for the quieting of the ſaid diſpute and controverſies, *as well the ſaid Jaſper as the ſaid Rowland,* on the 24th day of *October,* in the 13th year of the reign of our lord *Charles* the 2d, now king of *England,* &c. at *London* aforeſaid, to wit, in the pariſh of *St. Dunſtan* in the eaſt, in the ward of *Farringdon* without, *London, ſubmitted and put themſelves* (2) to and upon the award, order, determination, and

(1) It is held neceſſary, in debt on an award, to ſtate in the declaration for what cauſe the parties ſubmitted to arbitration; but where an award is pleaded in bar, it is ſufficient to aver that they ſubmitted themſelves to arbitration generally. 5 Edw. 4. 1 pl. 5. Bro. Arbitrement. 44. However, it is omitted in the declaration in *Coppin* v. *Hurnard,* poſt. 127. and it ſeems to be optional either to ſtate or omit it.

(2) In debt or aſſumpſit upon an award, it is neceſſary to ſtate in the declaration a mutual ſubmiſſion, as is done in this entry, and in other precedents. Poſt. 127. *Coppin* v. *Hurnard.* 1 Saund. 32. *Birks* v. *Trippet.* Raſt. 153. b. Co. Ent. 159. a. Lib. Plac. 107. pl. 3. 116 pl. 18 Brownl. Rediv. 181. Hanſ. Ent. 89. 91. Reg. 111. a.; an award being the determination of a third perſon between others who *ſubmit* to his judgment, and the *ſubmiſſion* creating a mutual obligation upon them to acquieſce in his deciſion. Therefore where in debt on an award, the plaintiff declared that the defendant by bond ſubmitted himſelf to the award of J. P. an arbitrator indifferently named and elected, as well *on the part* of the plaintiff, as of the defendant, and that J. P. awarded the defendant to pay ſo much, &c. it was held on demurrer that the declaration was inſufficient for want of ſhewing a mutual ſubmiſſion: for the words, "*on the part*" of the defendant, do not import the arbitrator to be named *by* the defendant; that there is a difference where the action is brought upon the bond of ſubmiſſion, and where upon the award itſelf; in the former caſe the defendant by praying oyer ſhews there were mutual ſubmiſſions, the condition always reciting it, but in the latter it muſt be averred, before the award can be properly introduced. 2 Str. 923, *Dilley* v. *Polhill.*

In general it is enough to allege that the plaintiff and defendant ſubmitted themſelves to the award of J. J. without ſetting out the ſubmiſſion, or ſaying that it was in writing; but where the parties are bound by their ſubmiſſion in a different manner from what they would in general be ſubject to, it is neceſſary to ſtate the terms of the ſubmiſſion in order to ſhew their liability in that particular caſe. As where in aſſumpſit againſt A. and B. the declaration ſtated that on the 23d *March* 1792, and for three years before A. rented a farm called L. and B. rented it for the two following years, and quitted on the 25th of *March* 1794, and afterwards the

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and judgment of *Thomas Whitehill* innkeeper, and *Richard Lilly* citizen and ſtationer of *London*, arbitrators indifferently choſen, as well on the part of the ſaid *Jaſper*, as on the part of the ſaid *Rowland*, to arbitrate, order, determine, and adjudge of and concerning all actions, ſuits, quarrels, controverſies, accounts, treſpaſſes, diſputes, claims, and demands whatſoever, then depending and being between the ſaid parties from the beginning of the world, until the ſaid 24th day of *October* in the year aforeſaid, ſo as the ſaid arbitrators ſhould make and publiſh their award touching the premiſes, in writing under their hands and ſeals, ready to be delivered to the ſaid *Jaſper*, and the ſaid *Rowland*, on or before the 7th day of *November* then next following; and if the ſaid arbitrators ſhould not agree in

ſo as they make their award in writing under their hands and ſeals, ready to be delivered on or before the 7th of November then next; and if they ſhould

the plaintiff rented it; this diſpute had ariſen between the defendants and plaintiff reſpecting the ſtate of the fences at the reſpective times when the defendants ſeverally quitted the farm, and that doubts had ariſen whether the defendant A. left the ſame in proper repair, and alſo whether the defendant B. left the ſame in repair, and that by an agreement in writing between the defendant A. on the firſt part, the defendant B. of the ſecond part, and the plaintiff of the third part, the ſaid parties jointly and ſeverally agreed to refer all matters in diſpute betweeen them to the determination of J. S. and the defendants thereby *jointly and ſeverally* undertook and agreed with the plaintiff to keep the award of J. S. and the plaintiff undertook to and with the defendants jointly and ſeverally to perform the award on his part. The declaration then ſtated that J. S. made his award and directed the defendant A. to pay ſo much money, and the defendant B. to pay ſo much to the plaintiff, but that they refuſed, &c. It was objected in arreſt of judgment, that this was not a joint, but a ſeveral, promiſe of each defendant to be anſwerable for himſelf only; for their intereſts in the ſubject matter of the promiſe were ſeveral and not joint; beſide, the arbitrators award nothing to be done by the defendants jointly, but that each ſhould pay a certain ſum; and 5 Rep. 18. b. *Slingſby*'s caſe was cited, in which it was adjudged, that where it appears by the declaration that every of the covenantees has a ſeveral intereſt or eſtate, the covenant made with them, *and every of them*, is ſeveral in reſpect of their ſeveral intereſts. But the court was of opinion that the words of the agreement were too ſtrong to be got over, and tho' it was reaſonable that each ſhould only make ſatisfaction for the time he occupied, and which would have been the caſe if the ſubmiſſion had been general, yet by the *terms* of the ſubmiſſion or agreement they have promiſed jointly and ſeverally, which makes them reſponſible the one for the other; and the objection was over-ruled. 7 Term Rep. 352. *Manſell* v. *Burredge*.

their

their ſaid award at and by the time aforeſaid, then as well the ſaid *Rowland* as the ſaid *Jaſper* on the 24th day of *October*, in the year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, put themſelves to and upon the award and umpirage of ſuch perſon as the arbitrators ſhould name and chooſe to end and determine the premiſes, ſo as the umpirage and award of ſuch umpire ſhould be put in writing under his hand and ſeal, before the 20th day of the ſaid month of *November*. And whereas alſo the ſaid arbitrators at any time after the ſaid 24th day of *October* in the year aforeſaid, or on or before the ſaid 7th day of *November* then next following, did not agree, make or publiſh any award touching the ſaid premiſes in writing under their hands and ſeals, ready to be delivered to the ſaid *Jaſper* and *Rowland*, according to the ſaid ſubmiſſion; but the ſaid arbitrators afterwards, to wit, on the 7th day of *November* in the year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, did name and chooſe one *Richard Weeks* of the pariſh of *St. Giles* without *Cripplegate* in the county of *Middleſex*, brewer, umpire, to end and determine the premiſes aforeſaid: which ſaid *Richard Weeks* afterwards and before the ſaid 20th day of *November* in the year aforeſaid, to wit, on the 19th day of *November* in the year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, having taken upon himſelf the burden of the ſaid umpirage and award, made his certain umpirage of and upon the premiſes (3) under the hand and ſeal of him the ſaid *Richard Weeks*

not agree, then to the umpirage of ſuch perſon as the ſaid arbitrators ſhould chooſe,

ſo as the umpirage ſhould be put in writing under his hand and ſeal before the 20th day of November.

The arbitrators did not agree,

but chooſe R. W. to be umpire,

(3) An award or umpirage ought in pleading to be ſtated to have been made purſuant to the ſubmiſſion, in form as well as ſubſtance; therefore regularly this declaration ſhould have averred that R. W. made his umpirage *in writing* under his hand and ſeal according to the ſubmiſſion; but as the umpirage is expreſſed to be *under his hand and ſeal*, it muſt neceſſarily be intended to be in writing; and ſo it was adjudged in *Fuller* v. *Lane*, cited by *Dolben* J. in *Reuſby* v. *Manning*. Carth. 159. and reported in 2 Sid. by the name of *Butler* v. *Lane*, where the ſubmiſſion was, "ſo that the award be made in "writing under the hands and ſeals "ready to be delivered to the parties, "&c." and it was pleaded that the arbitrators did make an award under their hands and ſeals, and ready to be delivered to the parties, and an exception was taken, that it was not expreſsly averred that the award was made *in writing*

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who awarded that the defendant ſhould pay the plaintiff 15l. within 14 days, but the defendant refuſes to pay.

Weeks, and by the ſaid umpirage awarded and ordained that the ſaid *Rowland Harridge* ſhould pay, or cauſe to be paid to the ſaid *Jaſper Hodſden* the ſum of 15l. of lawful money of *England*, within 14 days then next following, in full ſatisfaction of all debts, accounts and ſums of money due to the ſaid *Jaſper* (4); whereby an action has accrued to the ſaid *Jaſper* to demand and have of and from the ſaid *Rowland* the ſaid 15l. Yet the ſaid *Rowland* (although often required has not yet paid to the ſaid *Jaſper* the ſaid 15l. but to

writing, as the ſubmiſſion required: but it was not allowed, becauſe it muſt neceſſarily be intended it was in writing, it being pleaded to be under the hands and ſeals of the arbitrators; but *Hale*, who was then (1657) chief juſtice of C. B. doubted.

But where the ſubmiſſion is that the award ſhould be in writing under his hand and ſeal, it is not ſufficient to aver that it was *in writing* merely without more: As where in debt upon bond conditioned to perform the award of J. S. ſo as it be made in writing under his hand and ſeal by ſuch a day ready to be delivered to the parties; the defendant pleads no award made; the plaintiff replies that the arbitrator before the day made his award *in writing* which is ſet out, and a breach aſſigned; and on a general demurrer it was objected that it did not appear to be *under the hand and ſeal* of the arbitrator, as the ſubmiſſion required; and for this fault the court held the replication ill. 1 Str. 116. *Henderſon* v. *Williamſon*: See alſo 1 Bulſt. 110. *Scott* v. *Scott*. 1 Roll. Abr. 245. pl. 25. Palm. 109. 112. *Thayer* v. *Thayer*. Ibid. 121. *Gerdenfield* v. *Lane*. Cro. Jac. 278. *Sallows* v. *Girling*. 2 Mod. 77. *Columbel* v. *Columbel*.

(4) It is now uſual in practice to aver in the declaration in debt upon an award, and alſo in the replication in debt on bond conditioned for performance of an award, that the defendant *had notice* of the award; but ſuch an averment has been held not to be neceſſary, becauſe the defendant may take notice of the award as well as the plaintiff. 1 H. 7. 5. Bro. Condition. 124. Bro. Notice 18. 8 Rep. 92. b. *Fraunces*'s caſe. Cro. Car. 132. *Juxon* v. *Thornhill*. 2 Bulſt. 143. *Child* v. *Horden*. *Collet* v. *Bayfield* cited Hard. 42. For it is a general rule, that when a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requiſite; therefore if a man is bound by obligation, or covenants, or promiſes, to do a thing on the performance of an act *by a ſtranger*, notice need not be alleged, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril. 1 Bulſ. 44. *Gable* v. *Moſs*. 1 Roll. Abr. 462. pl. 3. 4. Freem. 254. *Clerke* v. *Child*. If however it be provided that the award ſhould be notified to the parties, it is no award until notice be given. 2 Bulſ. 144. *Child* v. *Horden*.

pay

pay the ſame to him has hitherto altogether refuſed and ſtill refuſes, to the damage of the ſaid *Jaſper* of 20l. and therefore he brings ſuit (5), &c. HODSDEN v. HARRIDGE.

And

(5) An action of *debt* lies on an award for *a ſum of money* awarded, upon a ſubmiſſion either by deed or in writing without deed, or by parol; but where an award is for performance of a collateral act where the ſubmiſſion was without deed, it was formerly holden, that there was no remedy to enforce it; but however the law is now taken to be, that the party may have *aſſumpſit* to compel performance. 2 Ld. Raym. 1040. *Purſlow* v. *Baily*. An award, though indented under the hand and ſeal of the arbitrator, is no deed or ſpecialty, but a writing under hand and ſeal. Sty. 459. *Dod* v. *Herbert*. 1 Burr. 281. *Perry* v. *Nicholſon*, *per Deniſon* J. therefore it is not neceſſary to make a profert of it. Sty. 459, 1 Salk. 73. *Foreland* v. *Marygold*. In debt on an award, it is enough to ſhew ſo much only of the award as is ſufficient to maintain the action; therefore if the plaintiff declares that it was (among other things) awarded, it is good. Lit. Rep. 312. *Leake* v. *Butler*, though *Twyſden* J is ſuppoſed to hold the contrary in a ſubſequent caſe which is very looſely reported. 1 Mod. 36. *Leach* v. *Morris*. So where in debt upon an award, by which it was awarded that the defendant ſhould pay the plaintiff 10l. in full ſatisfaction, it was objected that the declaration was not good, becauſe it did not appear that any thing was awarded to the defendant; but the court was clearly of opinion, that the plaintiff is not bound to ſhew in his declaration all the award, but only ſo much of it as does intitle him to the thing, &c. and if the defendant will impeach the award, it muſt come on his ſide. 1 Leon. 72. *Smith* and *Kirfoot*'s caſe. So in 1 Sid. 161. *Tilford* v. *French*, it was ſaid, and agreed to by *Twyſden* J. that if debt be brought upon an award for money generally, without ſhewing the award on both ſides, the action is maintainable. And in 1 Salk. 72. *Foreland* v. *Marygold*, it was agreed that, in debt on an award, the plaintiff need not ſet forth any more of the award than makes for him. 12 Mod. 534. 1 Ld. Raym. 715. S.C. So in 1 Bur. 280. *Perry* v. *Nicholſon*, it is ſaid that nothing is clearer than in an action of debt upon an award, a man has no need to ſtate in his declaration any more of the award, than ſupports his caſe; if there be any thing by way of condition precedent to the payment of the money, the defendant may ſet it out in pleading.

But in debt upon bond to perform an award, it ſeems neceſſary to ſet forth the whole award in the replication. 1 Salk. 72. *Foreland* v. *Marygold*; which diſtinction is recogniſed by *Deniſon* J. in the above cited caſe of *Perry* v. *Nicholſon*. 1 Burr. 281. But though the plaintiff in debt on an award is not bound to ſhew the whole award, yet if he does ſet forth the *whole*, and it appears to be a defective award the declaration is bad. Lit. Rep. 313. *Leake* v. *Butler*, as if he ſhews an award of money

HODSDEN v. HARRIDGE.

Plea.

And now at this day, to wit, on *Friday* next after three weeks of *St. Michael*, in the ſame term, until which day the ſaid *Rowland Harridge* had leave to imparl to the ſaid bill and then to anſwer, &c. before our lord the king at *Weſtminſter*, comes as well the ſaid *Jaſper* by his ſaid attorney, as the ſaid *Rowland* by *John Hardiſty* his attorney; and the ſaid *Rowland* defends the wrong and injury when, &c. and ſays that the ſaid *Jaſper Hodſden* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, that the ſaid bill of the ſaid *Jaſper* was exhibited on the 8th day of *April*, in the 20th year of the reign of our lord the now king, and not before, and that the cauſe of action, upon which the ſaid *Jaſper* has above declared againſt the ſaid *Rowland*, has not accrued within ſix (6) years next before the

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Cauſa actionis non accrevit infra ſex annos.

money on one part, and a releaſe on the other part, when the ſubmiſſion was by parol, and therefore no remedy for the releaſe, as the law then ſtood. 1 Sid. 160. *Tilford* v. *French*. S. C. 1 Lev. 113.

(6) By ſtatute 21 Jac. 1. c. 16. ſ. 3. it is enacted, "That all actions of "treſpaſs *quare claſum fregit*, all actions "of treſpaſs, detinue, trover, and re- "plevin, for taking away of goods and "cattle, all actions of account and upon "the caſe, other than ſuch accounts "as concern the trade of merchan- "dize between merchant and mer- "chant, their factors or ſervants, all "actions of debt grounded upon any "lending or contract without ſpecialty; "all actions of debt for arrearages of "rent, and all actions of aſſault, me- "nace, battery, wounding and im- "priſonment, or any of them ſhall be "commenced and ſued within the time "and limitation hereafter expreſſed, "that is to ſay, the ſaid actions upon "the caſe (other than for ſlander) and "the ſaid actions for account, and the "ſaid actions for treſpaſs, debt, deti- "nue and replevin for goods and cat- "tle, and the ſaid action of treſpaſs "*quare claſum fregit, within ſix years* "*next after the cauſe of ſuch actions or* "*ſuit*, and not after; and the ſaid ac- "tions of treſpaſs of aſſault, battery, "wounding, impriſonment, or any of "them, within four years next, after the "cauſe of ſuch actions or ſuits, and not "after, and the ſaid actions upon the "caſe for words within two years next "after the words ſpoken and not after." And by ſection 4, it is enacted, "That "if in any the ſaid actions or ſuits, judg- "ment be given for the plaintiff, and "the ſame be reverſed by error, or a "verdict paſs for the plaintiff, and "upon matter alleged in arreſt of "judgment, the judgment be given "againſt the plaintiff that he take no- "thing by his plaint, writ, or bill; or "if any the ſaid actions ſhall be brought "by original, and the defendant therein "be outlawed, and ſhall after reverſe "the outlawry; that, in all ſuch caſes, "the party plaintiff, his heirs, execu-

"tors

the exhibiting of the ſaid bill. And this he is ready to verify; wherefore he prays judgment, if the ſaid *Jaſper* ought to have or maintain his ſaid action thereof againſt him, &c. HODSDEN v. HARRIDGE.

And the ſaid *Jaſper Hodſden* ſays, that he, by any thing by the ſaid *Rowland* above in pleading alleged, ought not to be barred Demurrer.

"tors, or adminiſtrators, as the caſe "ſhall require, may commence a new "action or ſuit from time to time, with- "in a year after ſuch judgment reverſed, "or ſuch judgment given againſt the "plaintiff, or outlawry reverſed, and "not after."

It is now ſettled, that if the defendant would take advantage of this ſtatute it is neceſſary for him to plead it, although the cauſe of action appears on the declaration to have accrued upwards of ſix years before, and he will not be permitted to give it in evidence on the general iſſue. 1 Vent. 191. *Puckle* v. *Moor*. 1 Lev. 110. *Lee* v. *Rogers*. 2 Ld Raym. 838. *Gould* v. *Johnſon*. This however ſeems to be an exception to the general rule. In all other caſes except ſuch as are founded upon this ſtatute, and the 32 H. 8. c. 2. of limitations, (8 Rep 64. b. *Foſter*'s caſe) where an action is required by ſtatute to be commenced within a limited time, it is the duty of *the plaintiff* to prove that he has complied with the terms of it; and if he do not, he will fail in his ſuit. The ſtatute 31 Eliz. c. 5. ſ. 5. which limits actions upon penal ſtatutes to *two* years after the commiſſion of the offence, where the forfeiture is given to the king only, and to *one* year, where it is to the king and any other perſon, is conceived in terms almoſt ſimilar to the preſent: but it ſeems clear, that the defendant may take advantage of that ſtatute on the general iſſue, and need not plead it; the conſtant practice at *niſi prius* being, for the defendant to call upon the plaintiff to prove the commencement of his action within the limited period, and many queſtions ariſe as to what ſhall be ſaid to be a proper commencement of it. And indeed at firſt, it was conſidered not to be neceſſary for the defendant to plead this ſtatute; for in *Trinity* term, 4 Car. 1. which was ſoon after the making of the act, a motion was made in arreſt of judgment in *aſſumpſit*, that the promiſe was alleged in the declaration to be made beyond the time limited in the ſtatute, and all the court held that if it appear by the plaintiff's own ſhewing, that the action is not brought within the time limited by the ſtatute, he cannot maintain his action; or if the contract in *aſſumpſit*, or debt, be alleged to be within time, but, on *non aſſumpſit*, or *nil debet* pleaded, it appears in evidence that the contract was beyond the limited time, the action lies not, and the defendant ſhall take advantage thereof if it be ſpecially found by the jury; for the ſtatute is in the negative, "that he ſhall *not* maintain "ſuch action, but within the time li- "mited by the ſtatute." Cro. Car. 115. *Brown* v. *Hancock*; and in the caſes

HODSDEN v. HARRIDGE. *barred from having his ſaid action thereof againſt the ſaid Rowland,* becauſe he ſays, that the plea aforeſaid, by him the ſaid *Rowland,* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to bar the ſaid *Jaſper* from having his ſaid action thereof againſt him the ſaid *Rowland*; to which he the ſaid *Jaſper*

caſes of *Freeman* v. *Stacy*, and *Shervin* v. *Cartwright*. Hutt. 109. the general iſſue only was pleaded, and the jury found ſpecially that the actions were brought ſix years after the cauſes of action accrued, and the court decided the caſes upon the ſpecial verdicts. But the ſame objection having been made in a ſubſequent caſe, the court was equally divided upon it, *Jones* and *Whitlock* juſtices being of opinion, that, as the ſtatute has many exceptions, the defendant ought either to plead it, or demur, and *Hyde* chief juſtice, and *Croke* juſtice conceiving, that, as it appeared in the declaration that the contract was beyond the time of limitation, and the ſtatute is in the negative, "that it ſhall "not be brought," the defendant might take advantage of the ſtatute without pleading. Cro. Car. 163. *Trankerſley* v. *Robinſon*. And the objection being again taken about five years after in arreſt of jndgment, it was adjudged by *Jones* and *Berkley*, the only judges in court, that the defendant muſt plead the ſtatute; and the reaſon aſſigned was becauſe the plaintiff might be within the exceptions in the ſtatute, and the action therefore well brought, although the cauſe of action appeared on the face of the declaration to have accrued out of the limited time. Cro. Car. 381. *Stile* v. *Finch*. The ſame point was afterwards adjudged by the ſame two judges againſt the opinion of *Croke*, with this additional reaſon, that a latitat might have been ſued out within time, and continued down to the writ with which the defendant was ſerved. Cro. Car. 404. *Hawkins* v. *Billhead*; and at length it was fully ſettled, that no advantage can be taken of the ſtatute unleſs it be pleaded. See 1 Saund. 283. *note* (2).

Theſe reaſons ſeem to explain very ſufficiently the ground of not arreſting the judgment, on account of the action appearing on *the face* of the declaration to be out of time; but ſtill one is at a loſs to conceive why the defendant may not take advantage of the ſtatute in evidence on the general iſſue, and compel the plaintiff to prove, either that he brought his action within the time limited, or that he was within ſome one of the exceptions, and therefore could not bring it before. The reaſon given in 1 Levinz. 110. *Lee* v. *Rogers*, "that "the ſtatute was made for the eaſe of "thoſe who will take advantage of it, "and the court will not give a defen- "dant the advantage of it unleſs he "pleads it," though true as a propoſition of law, does not appear to be ſatisfactory. Perhaps the true ground of diſtinction, between the ſtatute of limitations, and the ſtatute 31 Eliz. and other ſtatutes limiting *penal* actions to a definite period, may be this; the former ſtatute limits thoſe actions, where a debt,

Jaſper has no neceſſity, nor is he bound by the law of the land, in any wiſe to anſwer. And this he is ready to verify; wherefore for want of a ſufficient anſwer in this behalf, he the ſaid *Jaſper* prays judgment and his debt aforeſaid, together with his damages, on occaſion of the detention of the ſaid debt, to be adjudged to him, &c.

And

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mer ſtatute limits thoſe actions, where a debt, or other cauſe of action, is already veſted in the plaintiff by means of ſome contract, or other tranſaction, between the plaintiff and defendant, prior to the bringing of the action; but in penal actions, the duty or right of action attaches in the plaintiff merely by bringing the action, and did not exiſt in him before; and unleſs he brings his action within the time preſcribed, there is no right of action attached in him; therefore he ſeems as much bound to prove the commencement of his action within time, which is the cauſe or conſideration of it, in order to intitle himſelf to a verdict, as a perſon who brings *aſſumpſit*, or debt, for goods ſold and delivered, or money lent, and the like, is to ſhew the cauſe or conſideration of his action, to intitle him to a verdict; and if he fail therein, it appears that he has no cauſe of action; but the ſtatute of limitations admits the cauſe or conſideration of the action ſtill exiſting, and merely diſcharges the defendant from the remedy, ſo that a promiſe within ſix years without any other conſideration is ſufficient to revive the action; therefore if he will take advantage of that circumſtance, it is neceſſary he ſhould plead the ſtatute. 5 Burr. 2630. *Quantock* v. *England*. 3 Term Rep. 11. *per Buller* juſtice, in *Petrie* v. *White*.

The plea of *non aſſumpſit infra ſex annos* is inſufficient in many caſes; for if the cauſe of action accrued within ſix years, it is immaterial when the promiſe was made. 2 Salk. 422. *Gould* v. *Johnſon*. S. C. 2 Ld. Raym 838. becauſe the ſtatute operates as a bar only from the time the cauſe of action aroſe, and not from the time of making the promiſe: the words of the ſtatute being, "within "ſix years next after the *cauſe* of ſuch "actions or ſuits," and not after. As if a promiſſory note were made ſeven years ago to pay money within three years after, the ſtatute is no bar; ſo if it were made ſeven years ago to pay money within three months after, though the ſtatute would be a bar, yet the defendant muſt not plead *non aſſumpſit infra ſex annos*, for that would be bad; but the plea muſt be *cauſa actionis non accrevit infra ſex annos*. 1 Vent. 191. *Puckle* v. *Moor*, and ſee 1 Saund. 33 *Birks* v. *Trippet*, note (2.) Indeed if *indebitatus aſſumpſit* be brought on a promiſe to pay on demand, the plea of *non aſſumpſit infra ſex annos* has been held to be good, becauſe it ſhews a debt due at the time of the promiſe: but if the promiſe were to do a collateral thing, which would create no debt till demand, it would be otherwiſe. Bull. *niſi prius*, 151. However though the ſtatute ſhould take place from the time of making the promiſe, as in the caſe before cited, or for goods ſold and delivered, money lent,

HODSDEN v. HARRIDGE. Joinder.

And the ſaid *Rowland* ſays, that the plea aforeſaid, by him the ſaid *Rowland* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law to bar the ſaid *Jaſper* from having his ſaid action thereof againſt the ſaid *Rowland*: which ſaid plea, and the matter in the ſame contained, he the ſaid *Rowland* is ready to

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or the like, yet the plea of *actio non accrevit infra ſex annos* is proper; therefore it ſeems to be the ſafeſt and beſt way of pleading the ſtatute, in all caſes of debt on ſimple contract, or *aſſumpſit*, to ſay, that "the ſaid ſeveral cauſes of "action in the ſaid declaration men-"tioned, or any, or either of them, did "not accrue to the ſaid (plaintiff) with-"in ſix years next before the ſuing forth "of the original writ (or exhibiting of "the bill) of the ſaid (plaintiff) &c." When the plea of the ſtatute of limitations was firſt pleaded, the way was to plead the ſtatute at large. 2 Mod. Ent. 142. Lib. Plac. 61.

If an aſſignee of a bankrupt declare that the defendant was indebted to the bankrupt, and promiſed *plaintiff* (the aſſignee) to pay, the defendant cannot plead that the cauſe of action did not accrue *to the bankrupt* within ſix years, becauſe the plea does not anſwer the promiſe in the declaration, and precludes the plaintiff from proving a promiſe to himſelf, therefore ſuch a plea is bad on demurrer. 2 Str. 919. *Skinner* v. *Rebow*. So where, in an action brought by the aſſignees of an inſolvent debtor, to recover money owing to him before his inſolvency, the plaintiffs declare that, in conſideration of the money being due to the inſolvent, the defendant promiſed to pay it *to them as aſſignees*, a plea, "that the ſaid ſeveral cauſes of action "in the ſaid declaration mentioned, "and each and every of them firſt ac-"crued to the *ſaid A. M.* (the inſolvent) "before the plaintiffs became aſſignees. "and that ſix years had elapſed after "the time when the ſaid ſeveral cauſes "of action, and each, and every of "them, firſt accrued to the ſaid *A. M.* "and before the day of ſuing out of the "original writ of the plaintiffs," has been held to be bad; for it does not contain any anſwer to the declaration, which ſtates a promiſe made *to the plaintiffs*. 2 H. Black. Rep. 561. *Kinder* v. *Paris*.

To the plea of the ſtatute, the plaintiff may reply a *latitat*, or *capias*, ſued out within time, and returned *non eſt inventus* by the ſheriff, and ſhew that the proceſs was regularly continued by *vicecomes non miſit breve* to the time of declaring. 2 Salk. 420. *Budd* v. *Berkenhead*. 421. *Green* v. *Revitt*; if the *latitat* be returned, the continuance may be entered at any time. 6 Term Rep. 617. *Harris* v. *Woolford*. See *ante* p. 1. *Mellor* v. *Walker*, note (1.) It muſt be a continuance of the *ſame* writ or proceſs which was originally ſued out, and muſt appear on the record to be ſo; for the proceſs muſt be taken out with intent to declare in that action, and be ſo ſtated, &c. Thus where the replication alleged that *a bill of Middleſex* was ſued out againſt the defendant, which

to verify and prove, as the court, &c. and becauſe the ſaid *Jaſper* does not anſwer the ſaid plea, nor has hitherto in any wiſe denied the ſame, he the ſaid *Rowland*, as before, prays judgment, and that the ſaid *Jaſper* may be barred from having his ſaid action thereof againſt him the ſaid *Rowland*, &c.

But

which was continued down to a certain time, when that proceeding ſtopped, and then the plaintiff ſued out *an attachment of privilege*; this was held not to be a continuance of the bill of *Middleſex*, or to have any connection with it. 3 Term Rep. 662. *Smith* v. *Bower*: ſee the form of the replication, Lib. Plac. 151. pl. 82. Lill. Ent. 32. Ibid. 122. but the laſt precedent is a bad one, for not ſtating that the firſt writ was returned. Willes's Rep. 255. *Karver* v. *James*. Although the firſt proceſs is erroneous, as where an attachment of privilege is returnable on a common return day inſtead of a day certain, yet, as it is only voidable and not void, if it be returned by the ſheriff, it is well enough to ſave the ſtatute of limitations, and will ſupport the continuance. 2 Black. Rep. 1131. *Leadbeater* v. *Markland*. Willes's Rep. 255. *Karver* v. *James*. So if the plaintiff reply an original *clauſum fregit*, he muſt ſhew that it was *returned and continued down to the writ with which the defendant is ſerved*. 1 Lutw. 260. *Kinſey* v. *Hayward*. S. C. 1 Ld. Raym. 432. where the judgment of the common pleas to the contrary was reverſed in the king's bench, and that judgment of reverſal affirmed in parliament. S. P. 1 Lutw. 279. 280. *Brereton* v. *Moyſe*. S. P. 3 Bof. & Pull. 330. *Stratton* v. *Savignac*. So, in *Brown* v. *Babington*, 2 Lord Raym. 883. Lord *Holt* ſaid, it was a fatal fault that the plaintiff did not ſhew the original writ ever returned; if the plaintiff ſhews a writ and does not return it, this will not avoid the ſtatute of limitations; to which the other judges agreed; and in *Atwood* v. *Burr*, 7 Mod. 5. Lord *Holt* ſaid, "that in pleading the "ſtatute of limitations he always uſed "to plead the return, and not the pur-"chaſe of the writ, for it is the return "that gives the court poſſeſſion of the "cauſe, and if one were to continue "a *latitat* for ſeveral years, he muſt "have the firſt writ returned, upon "which return the continuances are "made down, though in fact he never "takes out another writ, but there "muſt be a return of the firſt." S P. 6 Term. Rep. 617. *Harris* v. *Woolford*. But it is ſaid to have been adjudged in the common pleas, and afterwards in the king's bench on error, that if the plaintiff replies that he ſued out an attachment of privilege, it is not neceſſary to ſhew that the writ was returned and continued, for it is in nature of an original, and if an original is replied to the plea of the ſtatute, it is ſufficient to ſhew the *teſte* of it without any continuances; but if a *latitat* or *clauſum fregit* be replied, it muſt be ſhewn that it was continued properly to make it

HODSDEN v. HARRIDGE.

Curia adviſare vult.

But becauſe the court of our lord the king now here, is not yet adviſed what judgment to give of and upon the premiſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Saturday* next after the octave of *St. Hilary*, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the

the foundation of the ſuit. 1 Wilſ. 167. *Finch* v. *Wilſon*. However the authority of this caſe ſeems queſtionable; for in the caſe of *Budd* v. *Berkenhead*. 2 Salk. 420. S. C. Carth. 144. 1 Show. 366. it was held that an attachment of privilege muſt be returned and continued; and ſo is Willes's Rep 255. *Karver* v. *James*; and 3 Boſ. and Pull. 330. *Stratton* v. *Savignac*; and in the caſe of *Kinſey* v. *Hayward* it was determined both in K B. and in parliament, that an original muſt be returned and continued, and it does not appear from the report that either of theſe caſes was cited. If a *latitat* be in truth ſued out after the expiration of the ſix years, as where it is ſued out in the vacation, and of courſe bears *teſte* the laſt day of the preceding term, and that was before the expiration of the limited time, and the plaintiff replies the *latitat* ſued out on the day it bears date, the defendant may in his rejoinder ſhew the real day on which it was in fact ſued out, and aver that he did not promiſe before the laſt mentioned day. 2 Burr. 950. *Johnſon* v. *Smith*.

If an action is brought in an inferior court within ſix years, and, after ſome proceedings there, the time expires, and then the *defendant* removes the cauſe into the king's bench by *habeas corpus*, and the plaintiff declares there *de novo*, and the defendant pleads that the cauſe of action did not accrue within ſix years before the *teſte* of the *habeas corpus*, the plaintiff may reply and ſhew the ſuit in the inferior court, and that will be ſufficient to avoid the ſtatute; and the reaſon is, not that the action in the king's bench is a continuance of the ſuit below, but, as the plaintiff had purſued his right within due time, it ſhould not be in the defendant's power to defeat his right and take away his remedy without any fault in him. 2 Salk. 424. *Matthews* v. *Phillips*. 1 Sid. 228. *Bevin* v. *Chapman*.

If in *aſſumpſit* by an executor, in which all the promiſes are laid to be made to the teſtator in his life time, the defendant pleads that he did not promiſe within ſix years next before the obtaining of the original writ of the plaintiff, and the plaintiff replies that the original was ſued on ſuch a day, and within ſix years before the day of obtaining thereof, that is to ſay, on ſuch a day, letters teſtamentary were granted to him, by which the plaintiff's action accrued to him within ſix years; this replication is bad, becauſe the time of limitation muſt be computed from the time when the action firſt accrued to the teſtator, and not from the time of proving the will; for

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the king now here is thereof not yet, &c. At which day before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid, and becauſe the court of our ſaid lord the king now here, is not yet adviſed what judgment to give of and upon the premiſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*,

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for that gave no new cauſe of action, and therefore the time of proving the will is perfectly immaterial. *Willes*'s Rep. 27. *Hickman* v. *Walker*. But where to an action by an adminiſtrator for money had and received to his uſe by the defendant, who had received the inteſtate's money *after his death*, ſix years and upwards before the commencement of the action, but within ſix years after letters of adminiſtration granted to the plaintiff, the defendant pleaded the ſtatute of limitations, and the plaintiff replied the ſpecial matter above mentioned; it was held upon demurrer that the ſtatute was no bar, becauſe this was not a cauſe of action in the inteſtate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of adminiſtration, before which time no cauſe of action accrued to him. 2 Salk. 421, *Cary* v. *Stephenſon*. S. C. Carth. 315. Skin. 555. 4 Mod. 372. See *Stanford*'s caſe cited Cro. Jac. 61. *Saffyd* v. *Adams*. Theſe ſpecial replications muſt conclude with an averment to give the defendant an opportunity of anſwering the ſpecial matter. 4 Mod. 374. 376. *Curry* v. *Stephenſon*. So where, in aſſumpſit by an executor on a contract made with his teſtator, all the promiſes in the declaration are laid to be made *to H. his teſtator*, and the defendant pleads the ſtatute of limitations, the plaintiff cannot in his replication ſet forth a promiſe made to *himſelf* within ſix years, without being guilty of a departure, any more than he can in ſuch caſe give evidence of a promiſe made to himſelf within ſix years upon an iſſue joined on the plea of the ſtatute of limitations. *Willes*'s Rep. 9. *Hickman* v. *Walker*. 1 Salk. 28. *Dean* v. *Crane* S. C. 6 Mod. 309, 310. 2 Str. 890 Executors of the *Duke of Marlborough* v. *Widmore*. However in Carth. 471. *Heylin* v. *Haſtings*, it is ſaid to have been admitted that a promiſe made *to an executor* is ſufficient to prove the iſſue of *aſſumpſit to the teſtator* within ſix years, becauſe the promiſe does not give any new cauſe of action, but only revives the old cauſe, and is of no other uſe but to prevent the bar by the ſtatute of limitations; but this ſeems not to be well-founded; and it has ſince been determined, that evidence of an acknowledgment by the defendant within ſix years of an old exiſting debt, of above ſix years ſtanding, due to the plaintiff's inteſtate, but which acknowledgment was made after the inteſtate's death, will not ſupport a count by the adminiſtrator, laying the promiſe to be made to his inteſtate. 3 Eaſt. 409. *Sarell* v. *Wine*. So where to a declaration, in an action of aſſumpſit by the aſſignees of an inſolvent debtor for money due to him before his inſolvency, ſtating all the promiſes to have been made to

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Weſtminſter, until *Wedneſday* next after 15 days of *Eaſter*, then next following, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the king here is thereof not yet, &c. At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid, and becauſe the court of our ſaid lord the king

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the *plaintiffs*, the defendant pleaded that he did not *undertake and promiſe* in manner and form as the plaintiffs complained againſt him at any time within ſix years; he cannot rejoin, that the cauſe of action firſt accrued *to the inſolvent* before the plaintiffs became aſſignees, and that ſix years had elapſed after the cauſe of action firſt accrued to the *inſolvent*, for the rejoinder would be a plain departure from the plea. 2 H. Black. 562. *Kinder* v *Paris*, note (a.)

So the plaintiff may reply, on the fourth ſection of the ſtatute, that heretofore he obtained a judgment, which was reverſed, and that he now ſues within a year after the reverſal; or that he obtained a verdict and judgment was arreſted. Or the plaintiff may ſay in his replication, that he ſued out an original upon which the defendant was outlawed, and the outlawry was afterwards avoided by plea, or reverſed on error, and he ſued within a year. Sir W. Jones. 312. *Lambe* v. *Finch*, S. C. Cro. Car. 194. 3 Lev. 245. *Whitwick* v. *Hovendon* So where a perſon brings an action before the expiration of ſix years, and dies before judgment, the ſix years being then expired, it has been held that his executor or adminiſtrator may within the equity of the fourth ſection bring a new action. 2 Salk. 425. *Matthews* v *Philips*. 1 Lutw. 260. *Kinſey* v. *Hayward*; provided he does it *recently* or within a reaſonable time. No preciſe time is fixed as to what ſhall be deemed a reaſonable time; but it ſhould ſeem that the ſtatute is the beſt guide upon the ſubject, and as that provides that a new action, in the caſes enumerated in it, muſt be commenced *within a year*, ſo an executor ought alſo to bring a new action within that period. In 1 Ld. Raym. 434. *Kenſey* v. *Hayward*, a year is ſaid to be a reaſonable time; and the court of king's bench appears to be of this opinion in *Wilcocks* v. *Huggins*, 2 Str. 907. Fitzg. 170. 289, where it is ſaid, "that the moſt that had "ever been allowed was a year, and "that within the equity of the proviſo "in the ſtatute, which gives the plaintiff a year to commence a new action, "where the judgment is arreſted or reverſed; and that they would not go "a moment further, for it would let in "all the inconveniences which the ſtatute was made to avoid. Indeed if "the executor had been retarded by "ſuits about the will or adminiſtration, "and had ſhewn that in pleading, it "would have been otherwiſe, becauſe "the neglect would then have been accounted for." And in Fitzg. Lee J. ſaid, "I think what is or is not a recent "proſecution in a caſe of this nature is "to be determined by the diſcretion of "the court from the circumſtances of "the caſe; but generally the year in "the ſtatute is a good direction." However in *Lethbridge* v. *Chapman*, 15 Vin. 103. the action was allowed to be brought within 14 months after the teſtator's

king now here, is not yet adviſed what judgment to give of and upon the premiſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Friday* next after the morrow of holy *Trinity* then next following, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the king here is thereof

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tator's death, though no reaſon is aſſigned for it: Upon the whole therefore, it ſeems prudent for the executor to bring a new action as ſoon as he poſſibly can after the death of his teſtator, and at all events not to delay it beyond a year.

If an action be brought by a feme ſole within ſix years, and pending the action the ſix years expire, and then ſhe marries, whereby the ſuit abates, it has been holden that ſhe and her huſband may recently bring a new action within the equity of this clauſe of the ſtatute, though the ſecond action cannot in the nature of the thing be a continuance of the former writ; as where F. and E. his wife, adminiſtratrix of J. C. her late huſband, brought their bill in the king's bench againſt the defendant for money laid out by the inteſtate; the defendant pleaded *non aſſumpſit infra ſex annos*; the plaintiffs replied that E. when a widow, to wit, on ſuch a day, brought her original writ, and before the return ſhe married F. and they recently afterwards exhibited their bill againſt the defendant, rejoinder that E. married T. J. who was alive at the time of iſſuing the original; the plaintiffs ſurrejoined and tendered an iſſue; to which the defendant demurred; upon judgment given for the plaintiff in the king's bench without argument, a writ of error was brought in the exchequer chamber, where it was argued for the plaintiffs in error that the ſuit was abated by marriage, the voluntary act of the party; that the ſtatute of limitations was a law of peace for the ſecurity of property, and ought not to be extended by equity; Beſides a ſuit commenced by bill cannot be continued by original. It was inſiſted for the defendants in error that the new ſuit was brought within a reaſonable time, namely, within two terms, whereas it has been holden that a year is a reaſonable time. By the court; the ſtatute has received a favourable conſtruction; the ſuit was originally brought within the ſix years, and the new ſuit within two terms, and the ſtatute does not bar the action, it only takes away the remedy; and the judgment was affirmed. *Forbes* v. *Lord Middleton*, cited in Mr. *Durnford*'s note (*c*) to Willes's Rep. 259. *Karver* v. *James*.

The form of the replication by an executor, to a plea of the ſtatute, where he recently brings a new action after the death of the teſtator, is to ſtate that the teſtator on, &c. in ſuch a term in ſuch a year of the king's reign ſued out a *capias ad reſpondendum* (for inſtance), againſt the defendant returnable on the morrow of *All Souls*, that the ſheriff returned that the defendant was not found in his bailiwick and then

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thereof not yet, &c. At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid; and becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Saturday* next after three weeks of

continue the *capias* from term to term down to the time of the teſtator's death; that he appointed the plaintiff his executor, recently after whoſe death, to wit, in ſuch a term, &c. the plaintiff ſued out the writ upon which the action is founded; that the ſeveral writs ſo proſecuted by the teſtator againſt the defendant were with an intent to have impleaded the defendant upon the ſeveral promiſes in the declaration ſpecified; and that the writ ſued out by the plaintiff againſt the defendant was proſecuted againſt him with intent to implead him for the cauſes of action in the declaration ſpecified, and upon his appearance to declare againſt him for the ſaid ſeveral cauſes of action and that he afterwards on, &c. declared againſt the defendant, &c. with an averment that the ſeveral cauſes of action accrued within ſix years next before the ſuing out of the writ of *capias ad reſpondendum* firſt above ſpecified by the teſtator, &c.

If the defendant plead the ſtatute of limitations, and the plaintiff take iſſue upon it, evidence of a promiſe by the defendant, within ſix years before the commencement of the action, to pay the debt, is ſufficient to take the caſe out of the ſtatute. 6 Mod. 309. *Dean* v. *Crane*. And though it be a conditional promiſe, it is ſufficient if the plaintiff performs the condition; as where in *aſſumpſit* for goods ſold and delivered, the defendant denied he bought the goods, but ſaid "prove it "and I will pay you," this promiſe with a proof of the debt was held to take the caſe out of the ſtatute. 1 Salk. 29. *Heyling* v. *Haſtings*. 5 Mod. 425. Carth. 470. 1 Ld. Raym. 389. 422. Com. Rep. 54. S. C. A diſtinction was formerly taken between a *promiſe* to pay the debt, and a *bare acknowledgment* of it within that period; the former was ſufficient to take it out of the ſtatute, but an acknowledgment did not amount to a promiſe, but was ſaid to be only evidence of it, and therefore did not of itſelf take the caſe out of the ſtatute. 2 Vent. 152. *Bland* v. *Haſelrig*. 6 Mod. 309. 310. *Dean* v. *Crane*, Carth. 471. 2 Show. 126. *Dickſon* v. *Thomſon*. But this diſtinction is no longer regarded; it being now ſettled, that an acknowledgment of the debt takes it out of the ſtatute of limitations; *per Price*, Baron, *Exeter* Lent aſſizes 1717. 12 Vin. 192. Mſs. even though it be after the commencement of the action. 2 Burr. 1099. *Yea* v. *Fouraker*. And the ſlighteſt acknowledgment has been held ſufficient, as ſaying "I am ready "to account, but nothing is due to "you," or "if he has any demand on "me it ſhall be ſettled," will take a debt out of the ſtatute. Cowp. 548. *Truman*

of St. *Michael* then next following, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the king here is thereof not yet, &c. At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid, and becauſe the court of our ſaid

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man v. *Fenton. per* Lord *Mansfield.* S. P. 5 Burr. 2630. *Quantock* v. *England.* It was alſo holden, that a letter written by the defendant to the plaintiff on being ſerved with a writ, couched in ambiguous terms, neither expreſsly admitting or denying the debt, ſhould have been left to the jury to conſider whether it amounted to an acknowledgment of the debt ſo as to take it out of the ſtatute. 2 Term Rep. 760. *Lloyd* v. *Maund.* 4 Eaſt 599. *Bryan* v. *Horſeman.* 1 Boſ. & Pull. New Rep. 20. *Bicknell* v. *Keppel.* And the acknowledgment of one out of ſeveral makers of a joint and ſeveral promiſſory note has been holden ſufficient to take it out of the ſtatute as againſt the others, and may be given in evidence on a ſeparate action againſt any of the others. As where in an action on a promiſſory note executed by the defendant, he pleaded the ſtatute of limitations, and iſſue being joined upon it, the plaintiff produced a joint and ſeveral note executed by the defendant and three others, and proved payment, by one of the others, of intereſt on the note, and part of the principal, within ſix years; this being thought by the learned judge who tried the cauſe ſufficient to take caſe out of the ſtatute as againſt the defendant, a verdict was found for the plaintiff; and upon a motion for a new trial, the opinion of the learned judge was confirmed by the court of king's bench, who ſaid that payment by one is payment by all, the one acting virtually as agent for the reſt, ſo an admiſſion by one is an admiſſion by all, and the law raiſes the promiſe to pay when the debt is admitted to be due: and they ſeemed to over-rule the caſe of *Bland* v. *Haſelrig.* 2 Vent. 151. Doug. 652. *Whitcomb* v. *Whiting.* And upon the ſame principle, where one of two makers of a joint and ſeveral promiſſory note became a bankrupt, and the payee received ſeveral dividends under his commiſſion on account of the note, and an action being brought againſt the other maker of the note for the remainder of the money within ſix years after the receipt of the dividends, who pleaded the ſtatute of limitations, it was adjudged that the payment of the dividends under the commiſſion was ſuch an acknowledgment of the debt as took the caſe out of the ſtatute of limitations. 2 H. Black. 340. *Jackſon* v. *Fairbank.* (1).

After all, it might perhaps have been as well, if the letter of the ſtatute had been ſtrictly adhered to; it is an extremely beneficial law, on which, as it has been obſerved, the ſecurity of all men depends, and is therefore to be favoured. 2 Salk. 421, 422. *Green* v. *Revitt.* And altho' it will now and then prevent a man from recovering an honeſt debt, yet it is his own fault that he poſtponed his action ſo long; beſides which, the permitting of evidence of promiſes and acknowledgments within the ſix years ſeems to be a dangerous inlet to perjury.

lord

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lord the king now here, is not yet adviſed what judgment to give of and upon the premiſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Friday* next after the octave of the purification of the bleſſed virgin *Mary* then next following, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the king here, is therefore not yet, &c. At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid, by their attornies aforeſaid. Whereupon all and ſingular the premiſes being ſeen, and by the court of our ſaid lord the king here more fully underſtood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king here, that the plea aforeſaid, by the ſaid *Rowland* in manner and form aforeſaid above pleaded, is not ſufficient in law to bar the ſaid *Jaſper* from having his action aforeſaid againſt the ſaid *Rowland*: It is conſidered, that the ſaid *Jaſper* recover againſt the ſaid *Rowland* his debt aforeſaid and alſo 10l. for his damages which he has ſuſtained, as well on occaſion of the detention of that debt, as for his coſts and charge by him about his ſuit in that behalf expended, adjudged to the ſaid *Jaſper*, with his aſſent, by the court of our ſaid lord the king now here; And the ſaid *Rowland* in mercy, &c.

Judgment for the plaintiff.

Caſe 9.

Hodſden *verſus* Harridge.

Michaelmas, 20th of King *Charles* the 2d. Rol. 554.

S. C. 1 Lev. 273. 1 Sid. 415. 2 Keb. 462. 497. 533. 536. An award under the hands and ſeals of the arbitrators is not within the ſtatute of limitations.

DEBT on an award by *Hodſon* againſt *Harridge*; the plaintiff declares, that there were divers diſputes and controverſies between the plaintiff and defendant, concerning certain monies due to the plaintiff for malt ſold and delivered by him to the defendant, and for quieting thoſe controverſies, the plaintiff and defendant, on the 24th day of *October*, in the 13th year of the reign of the now king,

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ſubmitted (7) themſelves to the award of two arbitrators, and if they ſhould not agree by a certain day, then to the umpirage of an umpire to be choſen by the arbitrators, ſo as the umpirage ſhould be under the hand and ſeal of the umpire before another certain day; and the plaintiff avers that the arbitrators made no award, but choſe one *Weekes* to be umpire, who within the time made an umpirage under his hand and ſeal, and thereby awarded the defendant to pay the plaintiff 15l. in full ſatisfaction of all debts, accounts and demands due to the plaintiff: and for the non-payment of the ſaid 15l. the plaintiff brings his action, &c. The defendant pleads in bar the ſtatute of limitations, *and that the cauſe of action did not accrue within ſix years next before the exhibiting of the bill;* &c. this, &c. therefore, &c. upon which it was demurred in law. And the queſtion was, whether this action of debt on award be within the ſtatute of 21 Jac. 1. c. 16. of limitations or not?

And it was argued by *Saunders* for the plaintiff, in Trinity term laſt paſt, that it was not within the ſtatute; for the words of the ſtatute are, "all actions of debt grounded upon "any lending or contract without ſpecialty, and all actions "of arrearages of rent," ſhall be ſued within ſix years, &c. And he argued in the firſt place, that it was a ſpecialty, for the umpire has made his umpirage in writing under his hand and ſeal, as appears by the record, and therefore it was clearly out of the words and meaning of the ſtatute, which ſays, "actions of debt without ſpecialty," ſo that actions of debt upon ſpecialty were not limited, nor intended to be limited, by the ſtatute. And although *Jones* for the defendant objected, that the umpirage in writing under the hand

Actions of debt on ſpecialty are not limited by the ſtatute.

(7) Where the ſubmiſſion is by rule of court this difference is taken; when the parties intend to refer only *the cauſe*, the terms of the rule of reference are "all matters in difference *in this cauſe* "between the parties;" but when *all matters in difference* between the parties are meant to be referred, then the language of the rule is, "*all matters in* "*difference between the parties in this* "*cauſe*;" the terms of the ſubmiſſion in the latter inſtance being deſcriptive of the parties in the cauſe, and not of the particular cauſe between the parties. 2 Term Rep. 647. *Malcolm* v. *Fullarton.*

and

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A man may wage his law againſt an award in writing under hand and ſeal, unleſs the ſubmiſſion be by ſpecialty.
(*b*) S. P. Cro. Eliz. 557. Hampton *v.* Boyer, Ibid. 600. Bowyer *v.* Garland, Doc. Plac. 40.

and ſeal of the umpire was not any ſpecialty, becauſe a man cannot wage his law againſt a ſpecialty, but he may wage his law againſt an award in writing under hand and ſeal, unleſs the ſubmiſſion be by ſpecialty under the hand and ſeal of the party who ſubmits to ſuch an award, as appears in 2 Roll. Abr. 107. (C.) pl. 3. (*b.*) it was anſwered that, notwithſtanding the umpirage was not ſuch a ſpecialty as ſhall ouſt the party of his law, yet it was a good ſpecialty to prevent the limitation of the action upon it to ſix years, on account of the notoriety of the thing being in writing under hand and ſeal. For the ſtatute intends to limit thoſe actions only which ariſe upon a bare contract without any writing under ſeal, the proſecuting of which actions a long time after they firſt accrue, was often a great occaſion of perjury in witneſſes, and of oppreſſion to the defendant in ſuch actions. And this caſe may be compared to the caſe of an action of account, where, if the plaintiff declare againſt the defendant on a receipt *by his own hands*, the defendant ſhall wage his law; but if the plaintiff declares on a receipt *by other hands*, the defendant ſhall be ouſted of his law, on account of the preſumption of law that the country had notice of it (*a*). And where the ſtatute ſays that all actions of debt for arrearages of rent ſhall be limited, &c. it has been in conſtruction confined to mean thoſe actions of debt for arrearages of rent which is reſerved on a parol leaſe, and not a leaſe in writing; and therefore in *Hutton's* reports, 109. (*b*) an action of debt for arrearages of rent reſerved on a leaſe by ſpecialty (8) was adjudged not to be limited by the ſtatute, although the words of the ſtatute are general, namely, "all actions of

In an action of account if plaintiff declares on a receipt by the hands of the *defendant* he may wage his law, but if by *other* hands he ſhall be ouſted of his law.

[66]

Debt for rent reſerved on a parol leaſe, and not on a leaſe in writing, is limited by the ſtatute.
(*b*) Freeman *v.* Stacy.

(8) So the ſtatute of limitation 32 H. 8. c. 2. does not extend to actions founded upon a deed or ſpecialty; and therefore, if an avowry be for rent created by deed, as for a rent charge, it is not within that ſtatute, or for rent upon a reſervation by deed, for the reſervation will be the title. Co. Litt. 115. a. Moor. 31. pl. 102. Hutt. 109. 8 Rep. 64. b. *Foſter's* caſe. Sir *W. Jones*, 237, 238. *Fawkner* v. *Bellinghom.* So if a rent be originally created by act of parliament. Cro. Car. 81. *Fawlkner* v. *Bellinghom.*

(*a*) Comyns Rep. 272. *Walker* v. *Holyday.* Willes's Rep. 208. *Wheeler* v. *Horne.*

"debt

" debt for arrearages of rent," wherefore it was concluded that here was a ſufficient ſpecialty to prevent the ſtatute of limitations. And of ſuch opinion was *Kelynge* chief juſtice ſtrongly. Then it was argued upon the ſecond point, that admitting there was no ſpecialty at all, yet an action of debt on an award was not limited by the ſtatute, for the words being as before, " all actions of debt grounded upon any lend- " ing or contract without ſpecialty, &c." therefore all actions of debt without ſpecialty *generally* are not limited, but only all actions of debt without ſpecialty which are grounded *upon any lending or contract:* and here this action of debt is not founded upon any lending, and therefore it is not limited, though it be without ſpecialty. And as to the objection on the other ſide, that in the preſent caſe the *law* raiſes a contract, as, on a judgment or recovery in treſpaſs or trover, the law gives an action of debt as upon a contract raiſed by law, and therefore this caſe is within the expreſs letter of the ſtatute, being a debt grounded on a contract raiſed by law, it was anſwered, that all actions of debt whatſoever are founded upon a contract raiſed either in fact or by conſtruction of law, and by ſuch an expoſition, all actions of debt without ſpecialty generally will be limited by the ſtatute, which without queſtion was not the true meaning of it; for if it had been ſo, the words " grounded upon any lending or contract" had been needleſs and ſuperfluous: but the ſtatute intends to reſtrain and limit thoſe actions only which were founded upon any lending or contract *in fact* as appears by the words; and the word *lending* explains the word *contract* to be of the ſame nature. And in the preſent caſe, the action of debt is not founded upon any *lending* or *contract*, but it is a debt *ex quaſi contractu*, as the civilians term it, for which the law gives an action of debt, although there is no contract between the parties: ſo it is of a recovery in trover or treſpaſs in the county court, or court baron; and the caſe of debt for an amerciament in a court baron, and ſo in 11 H. 7. (*b*) debt for 3l. for a pound breach by the cuſtom of the manor, are all of them actions of debt without ſpecialty, becauſe the defendant may wage his law againſt them, and yet they are not founded upon any *lending or contract* between the parties; and

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(*b*) 13. b. 14. a. S. C. Bro. Debts 240. Preſcription 106.

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and in the two laſt caſes the debt is no contract, but is rather *debitum ex delicto*; and becauſe thoſe actions ſo rarely occur, and the actions of debt founded upon expreſs contracts between men without ſpecialty are ſo frequent every day, the ſtatute intends to reſtrain and limit the laſt mentioned actions, without having any regard to the others on account of the paucity of them, from the non-limitation of which the makers of the ſtatute did not find any ſuch inconvenience as they found in the non-limitation of actions of debt founded upon contracts in fact; *et ad ea quæ frequentius accidunt jura adaptantur*, as is ſaid in *Sherwin* and *Cartwright*'s caſe (*c*), where it is adjudged that an action *de rationabili parte bonorum*, (9) although in its nature it is only an action of detinue, which is expreſsly limited by the ſtatute, yet it was not within the ſtatute of limitations, becauſe it was an action which ſeldom happens; and therefore it was concluded, that this action was not within the ſtatute of limitations.

(*c*) Hutt. 109.

Jones for the defendant argued, that it was within the ſtatute, and ſtrongly enforced the two objections before mentioned; but after it had been twice argued in *Trinity* term, the whole court reſolved for the plaintiff. *Kelynge* chief juſtice, principally for the firſt point, that there was a ſufficient ſpecialty to prevent the ſtatute of limitations; and *Twyſden* juſtice, principally for the ſecond point, that this action was not within the limitation of the ſtatute at all, becauſe it was not founded upon any lending or contract; the other judges conſenting to both points; wherefore a rule was given for judgment for the plaintiff, unleſs cauſe, &c. but on the day of ſhewing cauſe, *Jones* moved, that the

(9) This writ lies, where the wife after the death of her huſband cannot have the third part of her huſband's goods after payment of debts and funeral expences, and then ſhe may have this writ againſt the executors of her huſband. And it ſeems by the ſtatute of *magna charta*, c. 18. that this was the common law of the realm at that time; and it appears by *Glanvil.* that it was the common law in his time, that after payment of debts, the goods were divided into three parts; one part to the wife, another part to the ſons and daughters, and the third to the executors: and the ſons and daughters are alſo intitled to have the like writ againſt the executors in caſe their third part is withheld. F. N. B. 284. 7th edit. See 2 Black. Comm. 491. 492.

demurrer

demurrer might be waved, and the defendant be permitted to plead the general iſſue: and becauſe *Saunders* would not conſent, it was adjourned over to *Michaelmas* term, and hung until this term; and it being now in the paper of cauſes, it was moved again for judgment for the plaintiff; and *Jones* would have ſpoken to it, but *Twyſden* juſtice ſaid, that it was reſolved by the court, in *Trinity* term before, for the plaintiff on both points; wherefore, in the abſence of *Kelynge*, he gave a rule for judgment, and the plaintiff had his judgment accordingly; whereupon the defendant brought a writ of error, but was afterwards nonſuited, as I was informed (10). HODSDEN v. HARRIDGE.

(10) So where the ſtatute of limitations 21 Jac. 1. was pleaded to debt upon the 2 and 3 Edw. 6. for not ſetting out tithes, it was held on demurrer that the ſtatute does not extent to this action. Cro. Car. 513. *Talory* v. *Jackſon*. So debt on an eſcape is not within the ſtatute. 1 Saund. 37, 38. *Jones* v. *Pope*. Nor debt for a copyhold fine: for it is not founded upon a contract or lending, 1 Lev. 373. *Hodgſon* v. *Harris*. *per Twyſden* juſtice. So debt againſt a ſheriff for money which he levied upon a *fieri facias* is not within the ſtatute. 2 Mod. 212. *Cockram* v. *Welby*. But by ſtatute 3 & 4 Ann. c. 9. ſ. 2. actions on promiſſory notes, which in ſome meaſure partake of the nature of ſpecialities, particularly in the manner of declaring upon them, ſhall be brought within the time appointed for commencing actions upon the caſe by the ſtatute 21 Jac. 1.

Underhill *verſus* Devereux.

Caſe 10.

Eaſter, 21ſt King *Charles* the 2d. Roll. 558. [68]

Scire facias ad computandum.

OUR lord the king hath ſent to the ſheriff of *Warwickſhire* his writ cloſe in theſe words, to wit: *Charles* the Second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Warwickſhire*, greeting; whereas *Walter Devereux* eſq. lately in our court, before us at *Weſtminſter*, by bill without our writ, and by the judgment of the ſaid court, recovered againſt

W. D. recovered a judgment in K. B. againſt W. U. for 1558l.

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againſt Sir *William Underhill*, knight, 1558l. for his damages which he ſuſtained as well on occaſion of certain treſpaſſes and aſſaults lately committed by the ſaid Sir *William* on the ſaid *Walter*, as for his coſts and charges by him about his ſuit in that behalf expended, whereof he is convicted, as appears to us of record. And whereas the ſaid *Walter* afterward, to wit, on the 30th day of *May* in the 14th year of our reign, came into our court before us at *Weſtminſter, and choſe* (1) to

and prayed an *elegit*.

(1) At common law, the conuſee of a recogniſance, or a plaintiff who had recovered judgment for *debt* or *damages*, was entitled only to two writs of execution, which he was bound to ſue out within a year after the recognizance or judgment; one, a *writ* of *levari facias*, by which the ſheriff might levy the corn, and other preſent profit which grew upon the land, and the rents payable by the tenants, and the beaſts levant and couchant upon the land; becauſe in all caſes of *levari facias* the land is conſidered as the debtor. Plow. 441. *Davy* v. *Pepys*, Skin. 619 *Breton* v. *Cole*, ſee ante p. 6. *Jeffreſon* v. *Morton*. note (1.); and the other a writ of *fieri facias*, by which the ſheriff was to ſeize the goods and chattels in execution. Indeed in all actions of treſpaſs *vi et armis*, becauſe the act was committed with force, the law allowed the defendant to be arreſted on meſne proceſs by a writ of *capias ad reſpondendum*: and if the plaintiff recovered judgment he might ſue out a writ of *capias ad ſatisfaciendum* againſt him; it being a rule that where a *capias* lies in proceſs, a *capias ad ſatisfaciendum* will lie after judgment. 3 Rep. 11. b. 12. a. Sir *William Harbert*'s caſe. 2 Inſt. 394. The firſt time, that *land* was ſubjected to the execution of a *judgment* or *recognizance*, was by the ſtatute of *Weſtminſter* 2d. (13 Edw. 1.) c. 18. which enacts, that "when debt is recovered "or acknowledged in the king's "court, or damages awarded, it ſhall "be from henceforth *in the election* "of him that ſueth for ſuch debt or "damages, to have a writ of *fieri facias* "unto the ſheriff to levy the debt of "the lands and goods; or that the "ſheriff ſhall deliver to him all the "chattels, (ſaving only his oxen and "beaſts of his plough,) and *the one half* "of his land until the debt be levied, "upon a reaſonable price or extent. "And if he put out of that tenement, "he ſhall recover by a writ of *novel* "*diſſeiſin*, or after, by a writ of *reſiſ-* "*ſeiſin*, if need be." This writ is called an *elegit*, becauſe the plaintiff or conuſee has made *his election* to ſue out execution of the land itſelf which is given by this ſtatute, inſtead of the common law execution of the goods by *fieri facias*; the entry, when the proceedings were in Latin, being, that the plaintiff "*elegit* "*ſibi liberari omnia catalla, &c. nec non* "*medietatem terræ*," as in the above precedent. Co. Litt. 289. b. 2 Inſt. 395. ſee the form of the writ Theſ. Brev. 93. Tidd's Pract. Forms. 345.

Lill.

to be delivered to him all the goods and chattels of the ſaid Sir *William* except the oxen and beaſts of his plough, and alſo a moiety of all the lands and tenements of the ſaid Sir *William* in your county, to hold to him and his aſſigns by a reaſonable price and extent, according to the form of the ſtatute thereof lately made and provided, until the damages aforeſaid ſhould be

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Lill. Ent. 571—578. 1 Richardſ. Prac. C. P. 281. 282. 5th edit. ſee alſo the entry of an award of an *elegit* on the roll, Theſ. Brev. 94. Lill. Ent. 210. *Mountfort* v. *Lord Griffin*. Lib. Plac. 455. pl. 38. Tidd's Pract Forms. 349.

The plaintiff may award upon the roll writs of *elegit* for the whole debt into as many different counties as he pleaſes, without being under the neceſſity of ſuing out *teſtatum* writs of *elegit*, and execute all or any of them at his pleaſure. Dyer, 162. b. pl. 51. Moor. 24. pl. 83. Earl of *Worceſter's* caſe. Cro. Jac. 246. *Goodyere* v. *Ince* S. C. Yelv. 179. The entry of an award of writs of *elegit* into different counties may be ſeen in Theſ. Brev. 94. Clift. 877. ſee alſo in Raſt. 261. b. pl. 3. the form of the return of the inquiſitions by the ſheriffs of the ſeveral counties. It is alſo ſaid, that the plaintiff may divide his execution into ſeveral ſums, as where he recovers 30l. he may have an *elegit* into one county for 10l., another *elegit* into another county for 5l., and another for the reſidue into a third county. Dyer. 162. b. pl. 51. Moor. 24. pl. 83. 2 Roll. Abr. 469. pl. 6. 1 Str. 461. *Oates* v. *Robinſon*; but an award of an *elegit* into ſeveral counties *for the whole debt* ſeems to be the moſt proper way, becauſe the judgment is intire. If a writ of *elegit* be ſued out, and the plaintiff extend the land upon it, and return and file the writ, it was long doubted whether he ſhould afterwards have an *elegit* into another county, or for other lands in the ſame county; but it ſeems to be now ſettled, that on a ſuggeſtion that the defendant has more lands, either in the ſame or another county, the plaintiff may have a new *elegit* for a moiety of the land in whatever county it lies. Moor. 341, *Hunger* v. *Frey*. 1 Roll. Abr. 404 pl. 6. Sty. 454, 455. *Strowd* v. *Keckwith*. Hob. 57. *Foſter* v. *Jackſon*.

Indeed it was formerly holden, that the bare entry of a *prayer* in the *elegit* upon the roll, was a bar to all other executions; for the plaintiff or conuſee, having made his *election* to take this remedy, had precluded himſelf from reſorting to any other kind of execution. 1 Roll. Abr. 904. (Y.) pl. 1. And this continued to be the law down to the time of Lord *Coke*, who ſays that a good clerk never enters an *award* of an *elegit* on the roll, until he has the effect of his execution. Cro. Jac. 338. *Crawley* v. *Lidgeat*. However it was *at that time* holden, that if, after an award of an *elegit* on the roll upon a judgment in C. B., it was removed by error into the K. B. and affirmed within the year, the plaintiff might have execution by *capias*, or *fieri facias*, even though a writ of *elegit* was ſued out, and returned by the ſheriff into the C. B. *ſerved*, before the judgment was removed into K. B.; becauſe that court could not take notice of it.

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be thereof fully levied; whereupon by our writ, we commanded the ſheriff of the ſaid county of Warwick, that he ſhould cauſe to be delivered to the ſaid Walter, by a reaſonable price and extent, all the goods and chattels of the ſaid Sir William in his bailiwick, except the oxen and beaſts of his plough, and alſo a moiety of all the lands and tenements of

1 Roll. Abr. 905. pl. 2. 4. But on further conſideration of the ſtatute of *Weſtminſter* 2d. it was adjudged, that an award of an *elegit* on the roll ſhould be no longer a bar to an execution by *capias ad ſatisfaciendum*, or *fieri facias*, but only the ſheriff's return, that he had delivered land according to the exigence of the writ. Hob 57, 58. *Foſter* v. *Jackſon*. 1 Lev. 92. *Glaſcock* v. *Morgan*. 2 Ld Raym. 1451. *Lancaſter* v. *Fielder*. 12 Mod. 356. 357. *Pullen* v. *Purbeck*. Therefore now if the ſheriff returns *nihil* to an *elegit*, the plaintiff may ſue out a *capias ad ſatisfaciendum*. Cro. Eliz. 160. *Knowles* v. *Palmer*. Or if nothing be done or returned upon an *elegit*, the plaintiff or conuſee ſhall have a *fieri facias*. Moor. 545 pl. 734. *Cooper* v. *Langworth* So if the ſheriff return that he has taken an inquiſition of the defendant's lands, but could not deliver a moiety to the plaintiff, becauſe it was already extended, the plaintiff may have a *capias ad ſatisfaciendum*, or *fieri facias*, for the ſheriff does not deliver the lands, which is the only bar given by the ſtatute. 1 Roll. Abr. 905 pl. 6. 1 Leon. 176. *Palmer* v. *Knowllis*. So if the ſheriff levy part of the debt upon the goods of the defendant, and return *nihil* as to the lands, the plaintiff may ſue out a *capias ad ſatisfaciendum* for the reſidue. 1 Str. 226. *Bacon* v. *Peck*. Or he may have debt upon the judgment, 1 Lev. 92. *Glaſcock* v. *Morgan*; where debt was brought upon the judgment after a part of the debt had been levied. The ſame point was alſo holden on the authority of this caſe in *Heſſe* v. *Stevenſon*, 1 Boſ. & Pull. N. R. 133. and that the defendant might be held to bail.

The reaſon why a *capias ad ſatisfaciendum* or a *fieri facias*, cannot be ſued out, after the ſheriff has delivered the land, ſeems to be, becauſe when an *elegit* is extended *upon the land* of the defendant, and returned and filed, it is conſidered in law as a full ſatisfaction and end of the ſuit; inſomuch that, if the land were afterwards evicted, the tenant by *elegit* was not intitled to a re-extent, but only to a writ of *novel diſſeiſin* or *re-diſſeiſin*, given by the ſtatute of *Weſtminſter*, for the law reputes him ſatisfied. Cro. Jac. 338. *Crawley* v. *Lidgeat*. But now by ſtatute 32 H. 8. c. 5. it is enacted, that if lands delivered in execution on a judgment, ſtatute, or recognizance, ſhall be evicted, without fraud or default of the tenant who holds them in execution, before the debt and damages are wholly levied, the recoveror, or conuſee, may have a *ſcire facias*, out of the ſame court from whence the execution did proceed, againſt the perſon on whom the execution was firſt ſued, his heirs, executors, or aſſigns, of lands then liable to the execution, returnable in the ſame court 40 days after the date of the *ſcire facias*; and if the defendant makes default

of the ſaid Sir *William*, in the county of *Warwick* aforeſaid, to hold the ſaid goods and chattels, as his proper goods and chattels, and alſo to hold the ſaid moiety of the lands and tenements aforeſaid as his freehold, that is to ſay, to him and his aſſigns, according to the form of the ſtatute in that caſe lately made, until the damages aforeſaid ſhould be thereof

fault, or ſhews not cauſe, the chancellor, or juſtices of the court where the *ſcire facias* is returned, ſhall make a new writ, of the like nature of the former execution, for levying the reſidue of the debt. This ſtatute is by a favourable conſtruction extended to the executors, adminiſtrators, and aſſigns of the recoveror. Co. Lit. 290. a. And though the ſtatute gives a *ſcire facias* out of the *ſame* court, yet if the record be removed by error into another court and affirmed there, the tenant by execution who is evicted ſhall have a *ſcire facias* by the equity of the ſtatute out of that court. Ibid. But ſtill if *part* only, and not the whole, of the land be evicted; indeed if all but one acre be evicted, or the whole for a time, as by a prior judgment, the plaintiff or conuſee ſhall not have a re-extent under this ſtatute, but muſt hold the reſidue until he be ſatisfied. Co. Lit. 289. b. 4 Rep. 66. a. *Fulwood's* caſe. Cro Jac. 338. *Crawley* v. *Lidgeat*.

In like manner if the plaintiff has levied part of the debt by a *fieri facias*, he may afterward have an *elegit* for the reſidue, in which he muſt recite the *fieri facias*, and ſhew how much was levied upon it. Hob. 58. *Foſter* v. *Jackſon*, 1 Sid. 91. *Berry* v. *Wheeler*. See the form, Theſ. Brev. 94. Tidd's *Prac. Forms*, 351. So if the plaintiff ſues out an *elegit*, and the ſheriff levies *goods only* under it for part of the debt, *and returns that the defendant has no lands*, the plaintiff may ſue out another *elegit*, as well as any other execution, and take the lands for the reſidue, or he may have an action of debt for the reſidue, as already obſerved; for in that caſe it is in effect nothing elſe but a *fieri facias*. Hob. 58. *Foſter* v. *Jackſon*. 1 Roll. Abr. 905. pl. 5. 1 Lev. 92. *Glaſcock* v. *Morgan*. S. C. 1 Sid. 184. 2 Ld. Raym. 1451. *Lancaſter* v. *Fielder*. 1 Str. 226. *Bacon* v. *Peck*. 1 Boſ. & Pull. N. R. 133. *Heſſe* v. *Stevenſon*. So if an *elegit* be returned *nihil* in one county, the plaintiff may have a *teſtatum* writ of *elegit* into another county. Bro. *Executions*, 72. *Elegit*, 11. S. C.; but it is ſaid, that a writ of *elegit* muſt be actually ſued out and returned *nihil* by the ſheriff, in order to warrant a *teſtatum elegit* into another county; for if ſeveral writs of *elegit* be awarded on the roll to different counties, and a *teſtatum elegit* is taken out to one of them, grounded upon a ſuppoſed *elegit* iſſued to the county where the venue is laid, and returned *nihil*, when in truth no ſuch writ was ever ſued out, or returned, the *teſtatum elegit* is erroneous; therefore where there are ſeveral writs of *elegit* awarded on the roll, care muſt be taken that *writs* of *elegit* only and not *teſtatum* writs be iſſued. Cro. Jac. 246. *Goodyere* v. *Ince*. S. C. Yelv. 179. It is holden that the executors or adminiſtrators of the plaintiff may have execution by *elegit* as well as the plaintiff himſelf, but they

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Sheriff returned an inquiſition.

thereof fully levied; and in what manner he ſhould have executed that precept, he ſhould make appear to us at *Weſtminſter*, on *Thurſday* next after three weeks of St. *Michael*, remitting to us there then that writ. At which day *Thomas Boughton* eſq. then ſheriff of the county of *Warwick* returned to us at *Weſtminſter*, a certain inquiſition

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cannot ſue it out without a *ſcire facias* even within the year. 2 Inſt. 395.

The words of the writ of *elegit* are, "To hold as his freehold," becauſe the ſtatute in caſe of eviction gives remedy by aſſize: ſtill however, tenant by *elegit* has no freehold, but only a chattel intereſt, which will devolve upon his executors. 2 Inſt. 396. It is ſaid, that an *elegit* may be ſued out after a year without a *ſcire facias*, *merely upon awarding an elegit upon the roll* within the year, and continuing it down by *vicecomes non miſit breve* to the time of ſuing out the writ. Carth. 283. *Seymour* v. *Greenvill*; and this appears to be warranted by the precedents. Clift. 874. 883. However it ſeems queſtionable, whether an *elegit*, or ſome other writ of execution ought not to be ſued out within the year, *and returned and filed*, to warrant the entry of the continuances; for in a ſubſequent caſe, it was adjudged that an execution cannot be continued on the roll unleſs it be returned and filed. 2 Wilſ. 82. *Blayer* v. *Baldwin*; and this is moſt agreeable to the manner of continuing writs on meſne proceſs, which cannot be ſo done, unleſs the writ be returned by the ſheriff *non eſt inventus*, and filed. See 1 Sid. 60. *Welden* v. *Greg*. Comberb. 346. *Vincent's* caſe. 7 Mod. 50. *Withers* v. *Harries*. S. C. 2 Lord Raym. 806. and in practice it is the conſtant courſe to ſhew that the writ is returned. The continuing of a writ of execution differs in one reſpect from that of a writ of meſne proceſs; in the latter, the ſame ſpecies of writ muſt be continued down; but with reſpect to executions, it is held, that one ſort of writ ſued out, returned, and filed, will ſupport the awarding of a different kind of execution afterwards; thus a *capias ad ſatisfaciendum*, or *elegit* may iſſue after the year, upon a *fieri facias* ſued out, returned, and filed within the year. As where a *fieri facias* was taken out within the year, and *nulla bona* returned, and continued down for ſeveral years, and then a *capias ad ſatisfaciendum* iſſued. The court, after taking time to inquire, ſaid that if it was a new caſe, they ſhould think it hard to take away all writs of *ſcire facias*, but the practice had gone ſo far that there is no overturning it now, wherefore the execution was held regular. 1 Str. 100. *Aires* v. *Hardreſs*.

The word "*price*," mentioned in the ſtatute is referable to the defendant's *goods and chattels*, and "*extent*" to the defendant's *lands*. 4 Rep. 74. b. *Palmer's* caſe. 2 Inſt. 396. The *elegit* is of a moiety of all the lands which the conuſor or defendant was ſeiſed of *at the time of the judgment or recognizance, or after*. 2 Inſt. 395. Dalt. Sher. 134. And the ſheriff may under it either

extent

tion (2) taken before him at *Mereden* in the ſaid county, on the 13th day of *October* in the 14th year of our reign, by the oath of 12 good and lawful men of the ſaid county, by virtue of the ſaid writ to him directed, by which it was found, that the ſaid Sir *William Underhill*, on the day of the giving of the ſaid judgment was ſeiſed in his demeſne as of fee, of, and in

Inquiſition ſet out.

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extend *a term for years*, that is, may deliver a moiety thereof to the plaintiff or conuſee, or ſell the whole term as part of the perſonal eſtate to the plaintiff, at a groſs price appraiſed and ſettled by the jury; 2 Inſt. 395. 8 Rep. 171. a. *Fleetwood*'s caſe. Dalt. Sher. 137. And if the defendant tenders the money at the time of the appraiſement, and before the delivery of the term, or even afterwards in court, the term is ſaved; and if it be delivered after, the defendant is intitled to an *audita querelâ*; but if no ſuch tender be made, the property in the term is altered by the delivery of the ſheriff, and the plaintiff may either keep, or diſpoſe of it, without being accountable for the profits. Moor, 873. *Comyn* v. *Brandlyn*. Gilb. *executions*, 34. But if the term be *extended* at an annual, and not a groſs, value, the plaintiff is accountable for the profits, and if he receives the debt out of the term before it expires, the defendant ſhall be reſtored to the term itſelf. Gilb. *exec.* 35. If a term be either appraiſed or ſold under an *elegit*, the commencement and end of the term muſt be found by the inquiſition according to Lord *Coke*, 4 Rep. 74. a. *Palmer*'s caſe; who ſays, that if it be found by the inquiſition that the debtor is poſſeſſed of lands *for a term of divers years yet to come*, it is inſufficient, though the ſale of ſuch an uncertain intereſt under a *fieri facias* is good, becauſe in his return to the laſt writ he only ſays that of the *goods and chattels* he cauſed to be made: ſee 3 Term Rep. 295. *Taylor* v. *Cole*; and this opinion is adopted by *Dalton* (*Sheriffs* 139.) and Lord chief baron *Gilbert*, (*Executions* 35.) But in the report of *Palmer*'s caſe by *Croke*, he ſays, that it was holden, that if the inqueſt find that the debtor is poſſeſſed *for a term of years yet to come*, which they appraiſe at ſo much without ſhewing the certain beginning or determination, it is well enough: for they ſhall not be compelled to find a certainty, not having means to be informed of it. Cro. Eliz. 584. *Palmer* v. *Humphry*, and this ſeems warranted by 3 Leon. 204. *Ruſh* v. *Heighgate*. The two reports may perhaps be reconciled by this diſtinction, that when the whole term is appraiſed and ſold for a groſs ſum as part of the debtor's perſonal eſtate, then, as the *elegit* is conſidered in the nature of a *fieri facias*, the ſheriff may ſell ſuch an uncertain intereſt under it as well as under a *fieri facias*; but when a moiety of a term is *extended at an annual value*, ſo general a finding by the inqueſt may perhaps be inſufficient; but ſee Lane, 50, 51. *Shoſtbey* v. *Walker*. But they both agree, that if the ſheriff ſell a term either *under* a *fieri facias*, or *elegit*, and miſrecite it in date,

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in divers lands and tenements, and that a moiety of all the lands and tenements, to wit, one capital meſſuage, and two cloſes of paſture called *New Piece* and *Broadleaſow* in *Idlicott*, of the clear yearly value in all iſſues beyond repriſes of 70l.; one meſſuage with the appurtenances in *Idlicott* in the occupation of one *William Martin*, and 90 acres of land to the

or time of duration in the former caſe, or the jury miſtake it in the latter, the ſale is void; unleſs he alſo ſells all the *intereſt* which the defendant has in the land, for then it is good notwithſtanding the miſrecital. Hence it appears, that, to avoid all difficulties and niceties on this ſubject, it is much more adviſeable to ſue out a *fieri facias* againſt the debtor's goods, and if they are inſufficient to ſatisfy the debt, to take out an *elegit* againſt his land for the remainder of the debt; for where an *elegit* is taken out, if the goods and chattels are ſufficient to ſatisfy the whole demand, the ſheriff ought not to extend the land. 2 Inſt. 395. So the ſheriff muſt deliver the goods of the defendant to the plaintiff at the price they are appraiſed at by the inquiſition, in which reſpect an *elegit* differs from a *fieri facias*; for in the latter the ſheriff cannot *deliver* the goods, though he may ſell them, to the plaintiff. 1 Ld. Raym. 346. *Pullen* v. *Purbecke*. And he muſt return that he delivered the term or goods at a reaſonable price fixed by the jury. Dy. 100. a. pl. 71. and *in the margin*. If the judgment be reverſed, the defendant ſhall be reſtored to the term or goods in ſpecie and not to the value; but where the goods are ſold under a *fieri facias*, the defendant is intitled only to the money which has been made by the ſale. Cro. Jac. 236. *Goodyere* v. *Ince*. S. C. Yelv. 179. 1 Roll. Abr. 778. (J.) pl. 1. 3. 4.

A judgment binds not only the lands of which the defendant is actually ſeiſed, but alſo reverſions on leaſes for lives or years, and therefore a moiety of a reverſion may be extended, and the plaintiff ſhall have a moiety of the rent. 1 Roll. Abr. 894 pl. 5. 3 Leon. 113. *Biſhop of Briſtow*'s caſe. Moor, 36. So rent charges may be extended, for they iſſue out of land. Bro. *elegit*. 13. Moor, 32. And by the ſtatute of frauds 29 Car. 2. c. 3. ſ. 10. lands held in truſt may be extended in the hands of truſtees for the debt of *ceſtui que truſt*. And lands in ancient demeſne are extendible, for the defendant has the property of the land itſelf; and on this execution the title of the lands is not queſtioned, but the judgment put in force. Hob. 47, 48. *Cox* v *Barnſly*. But copyhold lands are not extendible, becauſe the freehold is in the lord, and the copyholder is no more than a tenant at will according to the cuſtom of the manor; beſides which, it was thought unreaſonable that the lord ſhould have a new tenant put upon him without his conſent. 3 Rep. 9. a. *Heydon*'s caſe. 1 Roll. Abr. 888. (M.) pl. 2. Neither can an advowſon *in groſs* be extended on,

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the ſaid meſſuage belonging, of the clear yearly value in all iſſues beyond repriſes of 6l.; one other meſſuage with the appurtenances in *Idlicott* aforeſaid in the occupation of one *Henry Allys*, and 90 acres of arable land to the ſaid meſſuage belonging, of the clear yearly value in all iſſues beyond repriſes of 6l.; and one meſſuage in the occupation of one *Mark*

an *elegit*, becauſe a moiety cannot be ſet out, nor can it be valued at any certain rent towards payment of the debt. Gilb. *exec.* 39. An *elegit* does not lie of the glebe belonging to the parſonage or vicarage, nor of the church-yard. Ibid. 40. But it is ſaid that the lands of a biſhop may be extended on an *elegit*. Dalt. *Sher.* 136. So may the wife's lands which the huſband has during the coverture. Ibid.

(2) When an *elegit* is prayed, the ſheriff muſt take an inquiſition, for he cannot appraiſe the goods, or value and extend the lands himſelf, but the ſame muſt be done through the medium of a jury. Dy. 100. 2 Inſt. 396. Cro. Eliz. 584. *Palmer* v. *Humphry*. S. C. 4 Rep. 74. Dalt. *Sher.* 134. No notice is neceſſary to be given of executing the *elegit*.

The inquiſition ought to find the lands with convenient certainty, for to find no certain eſtate will be inſufficient. Moor, 8. pl. 28. And after the inquiſition is taken the ſheriff muſt deliver a moiety by metes and bounds. Hutt. 16. Dalt. *Sher.* 135. 1 Vent. 209. Anon. Cro. Car. 319. *Sparrow* v. *Matterſock*. Doug. 476. *Den.* v. *Ld. Abingdon*; and if he do not, the inquiſition is bad and may be quaſhed for uncertainty. Carth. 453. *Pullen* v. *Birkbeak*. And if the parcels delivered by the ſheriff amount to more than a moiety, the inquiſition is void for the whole. 1 Sid. 91. *Berry* v. *Wheeler*. 1 Ld. Raym. 78. *Pullen* v. *Birbeck*: and in an ejectment upon it advantage may be taken of this nullity. 2 Salk. 563. *Putten* v. *Purbeck*; but *Carthew* in his report of the laſt caſe makes Lord *Holt* ſay that the inquiſition is not void, but voidable only by error, or an *auditâ querelâ*. If the defendant be joint-tenant, or tenant in common, it ought to be ſpecially mentioned in the inquiſition. Hutt. 16. 1 Brownl. 38.

But the ſheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making *in value* a moiety of the whole. As where in ejectment an inquiſition was produced which mentioned by name all the different farms and tenements of which the defendant's eſtate in the county conſiſted, with their value, the number of acres in each, the tenant's names, yearly value beſides repriſes, and the clear yearly amount of the whole; and then, repeating the names of a certain number of them, their number of acres and yearly amount, it found that thoſe particular farms and tenements were a true and equal moiety of all the ſaid lands and premiſes of the defendant in the county, "which moiety "of the ſaid lands and premiſes; I the "ſaid ſheriff, on the day of taking this "in-

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Mark Marſhall, and 90 acres of land to the meſſuage belonging, of the clear yearly value in all iſſues beyond repriſes of 6l.; ſix cottages with the appurtenances in *Idlicott* aforeſaid in the ſeveral tenures of H. S. T. J. W. H. T. B. J. T. and E. M. widow, of the clear yearly value in all iſſues beyond repriſes of 6s.; ſeveral cloſes of land and paſture in *Idlicott* aforeſaid in the tenure of W. B. gent. called by the name of *Naſtene Hedge Cloſe*, and the rough ground near unto *Hawford*, of the clear yearly value of all iſſues beyond repriſes of 80l.; ſeveral cloſes of paſture in *Idlicott* aforeſaid in the ſeveral tenures of V. W. T. F. and M. B. called *Old Dikes*, or the upper grounds near *Baile*, of the clear yearly value in all iſſues beyond repriſes of 60l.; two cloſes of paſture in the tenure of T. B. called the *New Piece* and the *James*, of the clear yearly value in all iſſues beyond repriſes of 20l. which ſaid moiety the ſaid ſheriff on the day of the taking of the ſaid inquiſition cauſed to be delivered to the ſaid *Walter Devereux*, to hold to him and his aſſigns, according to the form of the ſtatute thereof made and provided, until he ſhould have thereof fully levied the damages in the ſaid writ

A moiety delivered to the ſaid W. D.

" inquiſition, have cauſed to be deliver-
" ed to the leſſor of the plaintiff, by the
" price and extent aforeſaid;" and upon production thereof, it was objected that the inquiſition was void on the face of it, for that a moiety of each farm ought to have been extended and delivered, and not a certain number of diſtinct farms amounting in value to a moiety of the whole. The court of K. B. overruled the objection, and *Buller* J. ſaid that the inquiſition and return were good, though ſeparate lands had been extended, provided it did not appear that they amounted in value to more than a moiety of the whole, and cited 2 Salk. 563. 1 Sid. 91. Cro. Car. 319. The objection went not only to every farm, but to every cloſe and field; and that, according to this notion, the writ could not be executed but by delivering an undivided moiety; yet moſt clearly that was not the meaning of the ſtatute, for it was agreed, that the moiety extended muſt be ſet out by metes and bounds. He took the meaning to be a moiety in value which is aſcertained by the jury: and the caſe of *Lord Stamford* v. *Nedham*, 1 Lev. 160. was denied. Doug. 473. *Den* v. *Earl of Abingdon*. So in Bro. *Elegit*. 14. it is ſaid by *Littleton*, that where an *elegit* iſſues againſt one who has two manors, the ſheriff may deliver *one manor* to the plaintiff in the name of a moiety of the whole, and is not bound to deliver a moiety of each manor, and the ſame of two acres: but ſays *Broke*, this ſeems to be where they are of equal value.

ſpecified

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Though W. D. has levied part of the ſum recovered out of the land, and W. U. has offered to pay him the reſidue, yet W. D. has refuſed to receive it. *Scire facias.*

ſpecified, as by the ſaid writ and inquiſition remaining in our court before us here of record (3) more fully appears. And although the ſaid *Walter* hath levied 1489l. 16s. out of the tenements aforeſaid, as manifeſtly appears by the ſaid extent; and the ſaid Sir *William Underhill* is ready to pay unto the ſaid *Walter* all the reſidue of the ſaid 1558l., that is to ſay, 68l. 4s., yet the ſaid *Walter* hath hitherto altogether refuſed to receive the ſaid 68l. 4s. as by the information of the ſaid Sir *William Underhill*, in our court before us, we have been given to underſtand; therefore we command you, that by good

(3) It is eſſential, that the *elegit* and inquiſition taken by the ſheriff ſhould be returned and filed, when land is extended by the writ. 5 Rep. 90 a *Hoe*'s caſe. 4 Rep. 67. a. *Fulwood*'s caſe. Dy. 100. a. *in marg.* But if the ſheriff returns on the *elegit* that the defendant has no land, he need not return any inquiſition at all. 2 Str. 874. *Stonehouſe* v. *Ewen*. If the inquiſition be void for uncertainty, or becauſe more than a moiety is delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain poſſeſſion of the land under it, the court on a ſuggeſtion thereof, or upon a *ſcire facias*, will order the writ to be vacated, and grant another and amerce the ſheriff. See the form. 1 Townſ. Judgm. 129, 130. So where fraud, deceit, or partiality has been practiſed, if the writ be not filed, the court will ſtay the filing of it, and grant another writ. 2 Inſt. 396. And they will grant another writ in either of the above mentioned inſtances, whether of defect, or fraud, after the firſt has been filed, according to the opinion of Lord *Hale*, which ſeems to be well founded. 1 Vent. 259. *Anon.* ſee 1 Ld. Raym. 718. *Pullen* v. *Birbeck*. S. C. 12 Mod. 355. See the form of the return and inquiſition. Cliſt. 877. Theſ. Brev. 93. Lill. Ent. 574. Tidd's *Practical Forms*, 347.

It was formerly the practice for the ſheriff to deliver *actual* poſſeſſion of a moiety of the lands; but he now only delivers *legal* poſſeſſion, and in order to obtain actual poſſeſſion the plaintiff muſt proceed by ejectment, 3 Term Rep. 295. *Taylor* v. *Cole*. 2 Tidd's K. B. 960. 2d edit. in which he muſt produce a copy of the judgment and of the writ of *elegit*, and of the inquiſition and return. Bull. *Niſi Pri.* 104.

But notwithſtanding the ſtatute of *Weſtminſter* 2d. firſt ſubjected lands to execution *on a judgment*, or a *recogniſance at common law*, yet by other ſtatutes lands were made ſubject to ſatisfy certain ſecurities created by them; ſuch as ſtatutes merchant, ſtatutes-ſtaple, and recogniſances in nature of a ſtatute-ſtaple.

A ſtatute merchant is a bond of record acknowledged before the mayor of *London*, or chief-warden of ſome other city or town, or other diſcreet men, choſen and ſworn for that purpoſe, when the mayor or chief warden cannot attend, or before one of the clerks of the ſtatute merchant nominated by the king purſuant

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Why the ſaid W. D. ſhould not receive the reſidue.

good and lawful men of your bailiwick, you make known to the ſaid *Walter*, that he be before us at *Weſtminſter* on *Saturday* next after the octave of St. *Hilary*, to ſhew if he has, or knows of any thing to ſay for himſelf, why he ought not to receive the ſaid 68l. 4s. the reſidue of the damages aforeſaid, of and from the ſaid Sir *William*, in full ſatisfaction

ſuant to the ſtatute of *Acton Burnell* 13 Edw. 1. enforced and amended by ſtatute 13 Edw. 1. ſt. 3. *de mercatoribus*. This recogniſance is to be entered by the clerk on a roll, which muſt *be double*, one part to remain with the mayor or chief warden, and the other with the clerk, who ſhall write with his own hand an obligation, to which the debtor's ſeal, together with the ſeal of the king appointed for that purpoſe, ſhall be affixed. Bac. Abr. *Execution* 331. The deſign of this ſecurity was to encourage trade, by providing a ſure and ſpeedy remedy for merchants, ſtrangers, as well as natives, to recover their debts at the day aſſigned for payment. Afterward other perſons, obſerving that it was much of the ſame nature with a judgment, but obtained with infinitely leſs trouble and expence, frequently entered into this ſpecies of contract until by degrees it became a common aſſurance, as we find it at this day. Ibid. The addition of the king's ſeal was to authenticate the ſecurity, and to make it of ſo high a nature, that, on failure of payment by the debtor at the day aſſigned, execution might be awarded without any meſne proceſs to ſummon him, or the trouble or charge of bringing in proof of the debt. Ibid. If the ſtatute merchant be not made purſuant to the above mentioned ſtatutes in a material part, it is void, and the conuſor ſhall be relieved on an *audità querelâ*; as if it be not ſealed with a ſeal of two pieces; or with the ſeal of the king and the party, Sir *W. Jones*, 52. *Meſſelyne* v. *Higford*. S. C. Bridg. 16. 19 Cro. Eliz. 233. *Aſcue* v. *Fuljambe*. Ibid. 355. *Hollingworth* v. *Aſcue*. 2 Roll. Abr. 466. pl. 2. So the ſtatute merchant is void if it is not made before the mayor of the town, or other officer or clerk appointed to take the ſtatute. Dal. 73. Bridg. 19. Or if it be made before one bailiff, where there are two; for both make but one officer. Winch. 83. 84. Or if it be not inrolled. Winch. 84. Bridg. 19. But the omiſſion of a circumſtance not material does not vitiate; as if it does not particularize any day of payment; for then it ſhall be paid preſently. Sir *W. Jones*, 52. Bridg. 19. Winch. 82. Or where the inrollment and writing is written by the clerk's ſervant, and not by the clerk himſelf. Winch. 83. See the form of a ſtatute merchant. Raſt. Ent. 594. b. Bridg. 18. But notwithſtanding a ſtatute merchant, for want of having a ſeal of two pieces, &c. be void as a ſtatute, yet it has been held that it is good as a bond, it having the ſeal of the conuſor, and may be ſued as a bond. Cro. Eliz. 355. *Hollingworth* v. *Aſcue*. S. C. Ibid. 494. 544.

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tion and diſcharge of the ſaid damages, in form aforeſaid recovered by the ſaid *Walter* againſt the ſaid Sir *William*, and why he ought not to be ſatisfied with the ſaid 68l. 4s., and why the tenements aforeſaid, heretofore delivered to the ſaid *Walter*, ought not to be re-delivered to the ſaid Sir *William*, if it ſhall ſeem expedient for him ſo to do; and further to

A ſtatute-ſtaple is a bond of record, acknowledged before the mayor of the ſtaple in the preſence of the conſtables of the ſtaple, or one of them, purſuant to ſtatute 27 Edw. 3. c. 9. To this end the ſtatute requires, that there ſhall be a ſeal ordained which ſhall be affixed to all obligations made on ſuch recognizances acknowledged in the ſtaple, and the ſeal ſhall remain in the cuſtody of the mayor of the ſtaple under the ſeals of the conſtables. Bac. Abr. *execution* 331, 332. This ſecurity was alſo only deſigned for the merchants of the ſtaple, and for debts on the ſale of merchandiſes brought there; but in time others began to apply it to their own ends; and the mayor and conſtables would take recognizances from ſtrangers, ſurmiſing it was made for the payment of money for merchandiſes brought to the ſtaple; to prevent this miſchief the parliament by ſtatute 23 H. 8. c. 6. ſ. 11. reduced the ſtatute-ſtaple to its former channel, and laid a penalty of 40l. on the mayor and conſtables who ſhould extend the benefit of the ſtatute to any but thoſe of the ſtaple. But though that ſtatute deprived them of this benefit, yet it framed a new ſort of ſecurity, to be uſed by all perſons, known by the name of a recognizance on 23 H. 8 c. 6., or a recognizance *in the nature* of a ſtatute-ſtaple, ſo called, becauſe this act limits and appoints the ſame proceſs, execution and advantage in every particular, as is provided for the ſtatute-ſtaple. Bac. Abr. *execution* 332.

A recognizance therefore in nature of a ſtatute-ſtaple, as the words of the act declare, is the ſame with the ſtatute-ſtaple, only acknowledged before other perſons; for as the ſtatute runs, the chief juſtices of the king's bench, and common pleas, or in their abſence out of term, the mayor of the ſtaple at *Weſtminſter*, and the recorder of *London* jointly together, ſhall have power to take recognizances for payment of debts in the form ſet down by the ſtatute. (which ſee in ſection 2 of the ſtatute 23 H. 8. c. 6.). In this, as in the former caſes, the king appoints a ſeal to atteſt the contract, and each of the juſtices has the keeping of one ſuch ſeal, and the mayor of the ſtaple at *Weſtminſter* and recorder, another, of the like print and faſhion; and every obligation made and acknowledged before either of the juſtices, or the mayor and recorder, muſt be ſealed with the ſeal of the conuſor, the king's ſeal, and the ſeal of the chief juſtice, or the ſeals of the mayor and recorder, before whom it is taken, who are likewiſe obliged to ſubſcribe their names, ſect. 3. Beſides which, the clerk of the recognizance, who is appointed for this purpoſe by the king, or his deputy

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to do and receive what our court before us ſhall then and there conſider of him in this behalf, and have there then the names of thoſe by whom you ſhall ſo make known to him, and this writ. Witneſs Sir *John Kelynge* knight, at *Weſtminſter*, the 28th day of *November*, in the 20th year of our reign, At which day, before our lord the king at *Weſtminſter*, comes the

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puty, is to make and write all obligations thus acknowledged, and enrol them in two ſeveral rolls indented, one whereof ſhall remain with ſuch of the ſaid juſtices, or with the mayor and recorder, that ſo ſhall take the recognizance, and the other with the clerk; who is further obliged, at the requeſt of the conuſee, his executors or adminiſtrators, to certify ſuch obligations into chancery under his ſeal, ſect. 4, 5. By ſtatute 27 Eliz. c. 4. ſ. 7, 8. the whole tenor and contents of all ſtatutes merchant and ſtatutes-ſtaple ſhall, within 6 months after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 H. 8. c. 6. who is to enter the ſame ſtatutes in a book provided for that purpoſe, and kept by him; and if they are not brought within 4 months after they are acknowledged to the clerk for the purpoſe of being ſo entered, the ſtatutes are made void againſt ſubſequent purchaſers for money or other good conſideration. This ſtatute does not extend to recognizances in the nature of ſtatutes-ſtaple; but by ſtatute 8 Geo. 1. c. 25. ſ. 1. the clerk of the recognizances in the nature of a ſtatute-ſtaple taken under 23 H. 8. ſhall yearly prepare and keep three parchment rolls as uſual, and, at the times of acknowledging every ſuch recognizance, ſhall write on the ſaid rolls the full tenor in *hæc verba* of every ſuch recognizance: and that one of the rolls ſhall contain the recognizances taken before the chief juſtice of the king's bench, another the recognizances taken before the chief juſtice of the common pleas, and the other the recognizances taken before the mayor and recorder, and at the time of the acknowledgment, the perſon before whom the recognizance is taken, and the party acknowledging the ſame, ſhall ſign their reſpective names to the roll or inrolment of the recognizance under the inrolment, as well as ſign and ſeal the ſaid recognizance; and that the three rolls ſhall at the end of the year be fixed together, and be made one roll, and remain in the cuſtody of the clerk or his deputy at his public office, who ſhall keep a docket to refer to the ſaid roll, for the benefit of ſearches by purchaſers and others.

The conuſee of a recognizance in nature of a ſtatute-ſtaple may wave the execution given by the 27 Edw. 3. ſ. 2. c. 9. and uſe it as an obligation, by bringing an action of debt, the recognizance having the ſeal of the conuſor to it. Bac. Abr. *execution*, 334.

By the ſtatute of *Acton Burnel*, 11 Edw. 1. and *de mercatoribus*, 13 Edw. 1. if the debtor does not pay, &c. the creditor ſhall bring his obligation to the mayor, &c. who ſhall incontinently cauſe the moveables of the debtor to the

the ſaid Sir *William Underhill*, in his proper perſon, and the ſheriff of *Warwickſhire* aforeſaid, to wit, *Humphry Jennens* eſq. returns, that by virtue of the writ aforeſaid to him directed, by *Henry Bowers* and *George Bowers*, good and lawful men of his bailiwick, he has given notice to the ſaid *Walter Devereux*, to be before our lord the king, at the day and

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Sheriff returns *ſcire feci*.

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the amount of the debt, to be ſold and delivered to the creditor by the appraiſement of honeſt men, and the king's ſeal ſhall be put to the ſale. And if the mayor find no buyers, he ſhall deliver the ſaid moveables to the creditor at a reaſonable price, &c. And the mayor may cauſe the body of the debtor (if lay) to be committed to priſon, till he agrees to the debt. And if the debtor have no moveables, of which the debt may be levied, or cannot be found within the juriſdiction of the mayor, he ſhall ſend the recognizance under the king's ſeal into chancery, and the chancellor ſhall direct a writ to the ſheriff to ſeize the moveables, or the body of the debtor (if lay) and make him agree the debt in the ſame manner as the mayor, if he had been in his power. And by 13 Edw. 1. if the debtor agree not the debt in a quarter of a year by ſale of his goods and lands, all his lands and goods ſhall be delivered to the merchant by reaſonable extent to hold till the debt be levied. But by ſtatute 27 Edw. 3. c. 9. the quarter of a year is ouſted; and execution ſhall be on a ſtatute-ſtaple as on a ſtatute-merchant; that is, of the debtor's body and all his lands and goods. And therefore upon a ſtatute-ſtaple or merchant, if execution cannot be made within the ſtaple, the recognizance ſhall be certified by the mayor into chancery under his ſeal.

The firſt proceſs upon a ſtatute merchant after it is ſo certified into chancery, is a writ of *capias ſi lacius*, directed to the ſheriff, commanding him to take the body of the defendant, if a layman, to ſatisfy the debt, ſee the form. F. N. B. 304. 7th edit. E. F. Theſ Brev. 56. Lill. Ent. 550. Tidd's *Pract. Forms*. 358. This writ is returnable either in K. B. or C. B. F. N. B. 304. G. though a *capias* upon a ſtatute-ſtaple is returnable in chancery only. Ibid. 306. If the ſheriff returns upon the writ of *capias ſi lacius* upon a ſtatute-merchant that the party was dead, or not found in his bailiwick, a writ iſſued to extend the lands, F. N. B. 304. note (a) which alſo may be made returnable in either bench; and the ſheriff may thereupon deliver the lands, &c. to the conuſee upon a reaſonable extent without the delay or charge of a liberate. 1 Vent. 41. Anon. Bac. Abr. *execution*. 333.—See the form of the extent Raſt. Ent. 594. b. 595. b. 596. a. 597. a. Theſ. Brev. 114. Clift. 869. Lill. Ent. 580. Tidd's Prac. Forms. 359. If the conuſor is a clergyman, he cannot be arreſted, but the ſheriff is commanded to levy the debt of his moveable goods and chattels by a writ of *levari facias*. F. N. B. 304. (A.) 305. 7th edit. See the form F. N. B. 304. (A). Tidd's Prac. Forms. 360. The entry of the writ of extent upon a ſtatute-

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and place aforeſaid, to ſhew in form aforeſaid, as the ſaid writ requires and commands: and the ſaid *Walter Devereux*, on the ſame day being ſolemnly demanded, by *Ralph Gregge* his attorney, comes and defends the wrong and injury when, &c. and prays leave to imparl thereto until *Wedneſday* next after 15 days of *Eaſter*, and he has it, &c. The ſame day

ſtatute-merchant, with the inquiſition returned by the ſheriff thereon, may be ſeen in Co. Ent. 296. a. Ibid. 297. a. a good form, where there is an award on the roll of two writs of extent to two counties, and an inquiſition returned by the ſheriff of each county. Ibid. 294. b. Clift. 868, Lill. Ent. 551.

But on a ſtatute-ſtaple, or recognizance in nature of a ſtatute-ſtaple, if the conuſor cannot be found within the ſtaple, nor his goods to the value of the debt, the firſt proceſs after the certificate under ſeal into chancery, is to take body, lands and goods all in one writ; in which reſpect it is preferable to the ſtatute-merchant, as being a much ſpeedier remedy. Bro. *Statute-merchant* 16. Bac. Abr. *execution.* 334. See the form of the writ F. N. B, 306, 7th edit. Tidd *Prac. Forms* 360. This writ is returnable into chancery, and the ſame ſort of proceedings are had under it for extending the lands, &c. as upon an *elegit*. But the ſheriff after the extent cannot deliver the lands, &c. to the conuſee, but muſt ſeize them into the king's hands, and in order to obtain poſſeſſion of them, the conuſee muſt ſue out a *liberate*, which is a writ iſſuing out of chancery, reciting the former writ and return, and commanding the ſheriff to deliver to the conuſee all the lands, tenements and chattels by him taken into the king's hands, if the conuſee will have them, by the extent and appraiſement made thereof, until he ſhall be ſatisfied his debt. See the form of the writ F. N. B. 306, 7th edit.; of the writ and return, Raſt. Ent. 598. a. b. ſee 1 Lutw. 429. *Young* v. *Johnſon*. Tidd *Prac. Forms.* 361. Upon this writ the ſherriff cannot turn the terre-tenant out of poſſeſſion, as upon an *habere facias poſſeſſionem*, but is only to deliver the legal poſſeſſion as upon an *elegit*, and in order to obtain the actual poſſeſſion, the conuſee muſt proceed by ejectment. 1 Vent. 41. 42. *Anon.*

The inquiſition ought to find the certainty of the conuſor's eſtate; for if it ſays that he was *ſeiſed* or *poſſeſſed* of, &c. it will be inſufficient, becauſe no certain eſtate is found. Dyer. 299. a. *in marg.* So if the death of the conuſor is returned by the ſheriff, and alſo an inquiſition of extent of the conuſor's lands, but in the inquiſition no certain eſtate is found, but generally that the conuſor *was ſeiſed* on the day of the making of the recogniſance of the manor of B., without ſaying of what eſtate, the inquiſition is void, for *ſeiſed* may be for term of life, or in tail, in which caſe the land is not extendible after his death; therefore as the death of the conuſor appears in the return, his

day is given to the parties aforeſaid there, &c. At which day, before our lord the king, comes as well the ſaid Sir *William Underhill*, in his proper perſon as the ſaid *Walter*, by his attorney aforeſaid. And the ſaid *Walter* (as before) defends the wrong and injury, when, &c. and ſays, that the tenements aforeſaid, with the appurtenances, ſo as aforeſaid

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his ſeiſin ſhould be found of a fee ſimple only. Dyer. 299. a. So if the inquiſition finds that the conuſor was ſeiſed of a *tenement* generally of ſuch a value, without ſhewing any houſe, land or paſture, it is bad for the uncertainty. Moor. 8 pl. 28.

When a full and perfect execution was had on a ſtatute by an extent returned and filed of record, the conuſee was not, in caſe of an eviction before the debt was ſatisfied, intitled to a re-extent at common law, any more than we have ſeen a plaintiff, or a conuſee of a recogniſance at common law, was; though indeed if the extent had been inſufficient in law, there might iſſue a new extent. Co. Litt. 290. But now this is remedied by the ſtatute 32. H. 8. c. 5. above mentioned. But it was held in Trin. 7. Geo. 1. *Oates* v. *Robinſon*. 1 Str. 461. that after an extent is returned and filed, and there has been no eviction, another extent cannot be ſued out into another country, unleſs the prayer of ſuch extent into the ſecond county was entered at the time the firſt extent was taken out. However the conuſee was relieved in equity by Lord *Macclesfield*, who gave him leave to enter the prayer *nunc pro tunc*. 2 P. Will. 92. *Oates* v. *Robinſon*. And afterwards the legiſlature, probably in conſequence of the deciſion in *Oates* v. *Robinſon*, enacted by ſtatute 8 Geo. 1. c. 25. ſ. 4. "that in caſe it ſhall at any "time or times, before or after the "filing or returning of any liberate or "liberates ſued out on any extent or "extents, upon a recogniſance in the "nature of a ſtatute-ſtaple, be made "appear to the court of chancery, "that ſufficient has not been extended "and levied, or ſufficiently extended "and levied, to ſatisfy ſuch recogniſ-"ance; or that any omiſſion, error, or "miſtake has happened in making, "ſuing out, executing or returning any "of the ſaid writs, or any proceſs there-"upon, or it ſhould happen that any "lands, tenements or hereditaments "ſhall be evicted from any perſon or "perſons, who ſhall have extended the "ſame by virtue of any ſuch writ or "proceſs as aforeſaid; that then and "in every ſuch caſe the ſaid court of "chancery ſhall and may award one or "more re-extent or re-extents for the "ſatisfying the ſame as aforeſaid, and "that writs of liberate may be ſued out "therupon."

But the *lands* of a debtor, or accountant to the king, were liable to the debt at common law, as well as his body and goods. 3 Rep. 12. b. *Harbert's* caſe. The king's debts are either of record, or not of record; in either caſe the remedy for the recovery of them is by writ of extent, which is either an immediate extent, or an extent in aid of the king's debtor: ſee the form of each

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ſaid delivered to the ſaid *Walter*, ought not to be re-delivered to the ſaid Sir *William*, becauſe he ſays, that for a long time after the delivery of the tenements aforeſaid, with the appurtenances, in execution for the damages aforeſaid, to wit, for two years after the delivery of the ſaid tenements in execution for the damages aforeſaid, the ſaid Sir *William* of his own

each. Tidd. *Pract. Forms.* 362. 366. Debts of record bind the debtor's land from the time of his becoming in debt to the king. 2 Roll. Abr. 156. (B.) pl. 1. And an execution may be taken out for ſuch debts, although an *elegit* may have been iſſued at the ſuit of a ſubject. Bac. *execution.* 365. 2 Roll. Abr. 156. 157. If the king's debt be prior on record, it binds the lands of the debtor into whoſe hands ſoever they come, becauſe it is in the nature of an original charge upon the land itſelf, and therefore muſt ſubject every body that claims under it; but if the lands were aliened in whole or in part, as by granting a jointure before the debt was contracted, ſuch alienee claims prior to the charge, and in that caſe the land is not ſubject. Bac. *execution.* 366.

As to debts not of record they bind the lands from the time they are entered into; which is by force of the ſtatute 33 H. 8. c. 39. ſ. 50. which enacts "that all obligations and ſpecialties "which ſhall be made for any cauſe "or cauſes touching or in any wiſe con- "cerning the king's moſt royal ma- "jeſty, or his heirs, or to his or their "uſe, commodity or behoof, ſhall be "made to his highneſs and his heirs, "kings, in his or their name or names "by the words, *to the lord the king*, and "to none other perſon or perſons to his "uſe, and to be paid to his highneſs by "theſe words, *to be paid to the ſaid* "*lord the king, his heirs, or executors*, "with other words uſed and accuſtom- "ed in common obligations, and that "all ſuch obligations and ſpecialties ſo "to be made, ſhall be good and effectual "in the law to all purpoſes and intents, "and ſhall be of the ſame nature, kind, "quality, force and effect, to all in- "tents and purpoſes, as the writings "obligatory taken and acknowledged "according to the ſtatute of tha ſtaple "at *Weſtminſter*." And by ſect. 53. "that all ſuits, proceſs, judgments, "decrees and executions hereafter to "be taken, purſued or given for the "king in any of the king's courts "mentioned in that act, of or upon "any of the obligations ſhall be of the "ſame or like ſtrength, force, effect "and intent in the law to all purpoſes, "only againſt all and all manner of "ſuch perſon or perſons as have been "bound in ſuch obligations or ſpecial- "ties, as well ſpiritual as temporal, "and againſt their heirs, ſucceſſors, "executors and adminiſtrators, and "every of them, and againſt none "other, as writings obligatory, taken "and acknowledged according to the "ſtatute of the ſtaple at *Weſtminſter* "at any time before the making of "that act had been uſed to be taken,

own wrong, held the ſaid *Walter* out of the poſſeſſion of the ſaid tenements with the appurtenances, and he the ſaid Sir *William*, during all that time, took, had, and received the rents, iſſues, and profits thereof to his own uſe. And this he is ready to verify. Wherefore he prays judgment, if the ſaid tenements before delivered to the ſaid *Walter* ought to be re-delivered to the ſaid Sir *William*, &c.

And the ſaid Sir *William Underhill* ſays, that he, by any thing by the ſaid *Walter Devereux* above in pleading alleged, Demurrer.

" exerciſed, and executed againſt any " lay perſon or perſons." And by ſect. 74. " if any ſuit be commenced, " or taken, or any proceſs be awarded " for the king, for the recovery of any " of his debts, then the ſame ſuit or " proceſs ſhall be preferred before the " ſuit of any perſon or perſons. And " that the king, his heirs and ſuc- " ceſſors, ſhall have firſt execution " againſt any defendant or defendants " of and for his ſaid debts before any " other perſon or perſon, *ſo always that* " *the king's ſuit be taken and commenced* " *or proceſs awarded for the ſaid debt at* " *the king's ſuit, before judgment given for* " *the ſaid other perſon or perſons.*" This ſtatute is held to abridge the old prerogative, and to be introductive of a new law; for the words *ſo always* that the king's ſuits, &c. make a condition precedent and a limitation. Therefore a judgment and execution *executed* by *elegit*, before any ſuit or proceſs commenced by the king, ſhall be preferred to the extent of the king iſſuing on a bond debt bearing date before the ſubject's judgment, and aſſigned to the king before the ſubject's execution. Hard. 23. *Attorney-General* v. *Andrew*. In *the King* v. *Cotton*. Park. Rep. 112. it was holden that an immediate extent againſt the king's debtor teſted *after* a diſtreſs for rent juſtly due to the landlord and notice to the tenant, being the king's debtor, and *after* appraiſement of the goods and chattels, but *before* ſale, ſhall prevail againſt the diſtreſs. And it was further ſaid, that goods taken in execution, and *remaining unſold*, are liable to ſeizure upon an extent teſted after the ſeizure. However, in the caſe of *Uppom* v. *Sumner*, 2 Black. Rep. 1251. 1294. it was holden, that an extent came too late after the defendant's goods were ſeized in execution on a judgment at the ſuit of a ſubject, but before ſale. And in *Rorke* v. *Dayrell*, 4 Term Rep. 402. the ſame point was determined. But in the caſe of *The King* v. *Pickman*, which was argued in the Exchequer in Michaelmas term 1805, by *Percival* Attorney-General for the crown, and *Williams* ſerjeant for the defendant, after full conſideration of all the authorities, the court decided that goods ſeized under an execution on a judgment at the ſuit of a ſubject are *before ſale*, liable to be taken by virtue of an extent, teſted after the delivery of the *fieri facias* to the ſheriff. And they over-ruled the caſes of *Uppom* v. *Sumner*, and *Rorke* v. *Dayrell*. A baron's fiat is the true commencement of the king's ſuit.

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ought not to be prevented or delayed from having a re-delivery of the ſaid tenements; becauſe he ſays, that the ſaid plea, and the matter in the ſame contained, are not ſufficient in law to bar him the ſaid Sir *William Underhill* from having a re-delivery of the ſaid tenements, to which he the ſaid Sir *William Underhill* has no neceſſity, nor is he bound by the law of the land, in any manner to anſwer. And this he is ready to verify. Wherefore for want of a ſufficient plea in this behalf, he the ſaid Sir *William* prays judgment, and that the ſaid tenements may be re-delivered to the ſaid Sir *William Underhill*.

Joſnder.

And the ſaid *Walter Devereux* ſays, that the plea aforeſaid by him the ſaid *Walter Devereux*, in manner and form aforeſaid pleaded, and the matter in the ſame contained, are good and ſufficient in law to bar the ſaid Sir *William Underhill* from having a re-delivery of the ſaid tenements; which ſaid plea and the matter in the ſame contained, he the ſaid *Walter Devereux* is ready to verify and prove, as the court, &c. And becauſe the ſaid Sir *William* does not anſwer the ſaid plea, nor has hitherto in anywiſe denied the ſame, he the ſaid *Walter*, as before, prays judgment if the ſaid tenements ought to be re-delivered to the ſaid Sir *William Underhill*, &c. But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſſes, a day thereof is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until *Friday* next after the morrow of the Holy Trinity, to hear their judgment of and upon the premiſſes, for that the court of our ſaid lord the king now here is thereof not yet, &c.

Continuance.

Underhill *verſus* Devereux.

Caſe 10.

Paſch. 21ſt of King *Charles* the 2d. Roll. 558.

SCIRE Facias (4) by *Underhill* knight, againſt *Devereux*, that whereas the defendant had recovered againſt the plaintiff in this court 1558l. for damages and coſts in an action of aſſault and battery, and afterwards, to wit, on the 30th day of *May*, in the 14th year of the reign of the now king, the defendant had ſued out an *elegit* upon the ſaid recovery, returnable on *Thurſday* next after three weeks of St. *Michael*, whereby the ſheriff of *Warwickſhire*, on the 13th of *October* in the 14th year aforeſaid, had delivered to the defendant divers lands and tenements for a moiety, at a certain yearly value, as by the record appears; and although the defendant has levied 1489l. 16s. out of the tenements aforeſaid, as by the extent aforeſaid manifeſtly appears, and he (the plaintiff) is ready to pay all the reſidue of the ſaid 1558l., that is to ſay, 68l. 4s. to the ſaid *Walter* (the defendant), yet the ſaid defendant has hitherto altogether refuſed to receive the ſaid 68l. 4s. as from the informaſion, &c. therefore you make known

S. C. 2 Keb. 245.

If the party himſelf hold out the tenant by elegit from the tenements extended the tenant by elegit may hold over, but if a ſtranger holds out the tenant by elegit, he cannot hold over; but is put to his action of treſpaſs againſt the ſtranger.

(4) A *ſcire facias* is a judicial writ, founded on ſome matter of record, as a recognizance either at common law or by ſtatute, judgment, letters patent, and the like, to enforce the execution of them, or to vacate and ſet them aſide. And, as the defendant may plead thereto, it is, as we have already ſhewn, conſidered in law as an action, and in the nature of a new original. Skin. 682. *Woodyeer* v. *Greſham*. S. C. Comb. 455. See *ante*, p. 6. note (1.) *Jeffreſon* v. *Morton*; therefore to authoriſe the plaintiff's attorney to ſue out a *ſcire facias*, he muſt have a new warrant. Cro. Eliz. 177. *Herd* v. *Burſtowe*. 2 Ld. Raym. 1048. *Treviban* v. *Lawrence*; for although any one may pray a *ſcire facias* for the plaintiff, yet judgment upon it can only be prayed for by attorney, and conſequently, if no warrant of attorney be entered on the record, it is error. 2 Ld. Raym. 1252. *Atwood* v. *Burr*. S. C. 1 Salk. 89. 2 Salk. 603. and becauſe it is a new action, there is no neceſſity for an order to change the attorney in the former ſuit. 7 Term Rep. 337. *Bachelor* v. *Ellis*. So where a judgment was entered for ſecuring the payment of an annuity *before* the ſtatute 17 Geo. 3. c. 26., which enacts, "that "before any execution ſhall be ſued out "or

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known to the ſaid defendant to ſhew wherefore he ought not to receive the ſaid 68l. 4s. the reſidue of the ſaid damages, from the ſaid plaintiff, in full ſatisfaction and diſcharge of the ſaid damages in form aforeſaid recovered by the ſaid defendant againſt the ſaid plaintiff, and why he ought not to be ſatisfied with the ſaid 68l. 4s. and the tenements, heretofore

" or *action* brought, on any ſuch judg- " ment already entered, a memorial of " the deed, bond, inſtrument, &c. ſhall " be enrolled in chancery," a *ſcire facias*, iſſued after the act to revive the judgment, was ſet aſide, for want of ſuch a memorial, becauſe it was an *action* upon the judgment, and therefore within the ſtatute. 1 Term Rep. 267, 268. *Fenner* v. *Evans*. It has however been adjudged that a writ of error does not lie into the exchequer chamber on a judgment given in the king's bench on a *ſcire facias*, but only into parliament; the ſtatute 27 Eliz. c. 8. ſ. 2. which gives the writ of error into the exchequer chamber, mentioning only actions of debt, detinue, covenant, account, actions upon the caſe, *ejectione firmæ*, or treſpaſs. Cro. Car. 286. *Nevill* v. *South*. Ibid. 300. *Lancaſter* v. *Keyleigh*. Ibid. 464. *Anon*. 1 Roll. Rep. 264. *Harvey* v. *Williams*. 1 Vent. 38. *Wingate* v. *Stanton*. 1 Sal. 263. *Hartop* v. *Holt*. S. C. 1 Ld. Raym. 97.

However a *ſcire facias* upon a *judgment* is to ſome purpoſes only a continuation of the former ſuit, although upon a *recognizance* it is always an original proceeding; as where the defendant's attorney, after the plaintiff had obtained an interlocutory judgment, and executed a writ of inquiry, agreed that no writ of error ſhould be brought, and the defendant dying before the return of the writ, a *ſcire facias* iſſued againſt his executors to recover the damages againſt them, upon which they brought a writ of error; the court held that, inaſmuch as the *ſcire facias* was in this caſe not a new action, but only a continuation of the old one, and brought merely to revive the former judgment, the executors were bound by the agreement of the teſtator's attorney; and as the teſtator himſelf, if he had lived, could not have brought a writ of error, neither could his executors; therefore the court ordered the teſtator's attorney to *non-pros* the writ of error. 1 Term Rep. 388. *Wright* v. *Nutt*.

So if a bill of exceptions be ſealed by a judge, and he dies, a *ſcire facias* lies againſt his executors or adminiſtrators to certify it. 2 Inſt. 428. And if a ſheriff return that he has levied the debt under a *fieri facias*, and has the money ready, but retains it in his hands, a *ſcire facias* lies againſt him to have execution of it. Hutt. 32. *Smith* v. *Liveſey*. So if the ſheriff return that he ſeiſed goods under a *fieri facias* to a certain value, and ſold part of them, but the reſt remained unſold for want of buyers, and were afterwards *reſcued*, a *ſcire facias* lies againſt him to have execution to the *whole value* returned; for as the return of the reſcue is not a good one in law, and the ſheriff has admitted that he ſeized goods to that value, he is anſwerable to the plaintiff to the whole amount of it. Cro. Jac. 514. *Sly* v. *Finch*. Poſt. 343. *Mildmay* v. *Smith*. But if the ſheriff had only returned, that the goods remained

in

tofore delivered to the ſaid defendant, ought not to be reſtored to the ſaid plaintiff, if, &c. And upon this writ the ſheriff returned a *ſcire feci*, and the defendant appeared and pleaded in bar, that the plaintiff for a long time, to wit, for two years after the delivery of the ſaid tenements in execution for the damages aforeſaid, of his own wrong held the ſaid defendant

in his hands for want of buyers, a *ſcire facias* would not lie, but either a *venditioni exponas*; if the ſheriff be ſtill in office, or a *diſtringas nuper vicecomitem* if he be out of office. Ibid. So if the ſheriff return an *elongavit*, to a writ of *retorno habendo* in replevin either by plaint or writ, and removed into K. B. or C. B., a *ſcire facias* lies on the judgment of *retorno habendo* againſt the pledges, to ſhew cauſe why their goods to the value of the goods replevied, and delivered to the plaintiff, ſhould not be delivered to the defendant. 3 Mod. 56. *Dorrington* v. *Edwin*. S. C. Comber. 1, Skinn 244. 2 Show. 421. 485. S. P. Fort. 330. *Mulſo* v. *Shore*; ſee the form of the *ſcire facias*. Raſt. Ent. 569 b Theſ. Brev. 274, 275. See alſo 1 Saund. 195. a. b. note (3.)

The beſt way perhaps to explain the nature of a *ſcire facias*, will be to conſider it, 1. when it is brought upon a recognizance acknowledged to ſecure the payment of a debt, or to do ſome other act; 2. upon a recognizance entered into by bail; 3 upon a judgment; and 4. upon letters patent. And firſt as to a recognizance to ſecure the payment of a debt; it is to be obſerved, that a recognizance is an obligation acknowledged either before ſome court of record, or before any one of the judges of *Weſtminſter Hall* in term, or out of term, and in any part of *England*, or before the lord chancellor or keeper, or by the cuſtom of the city of *London*, before the mayor and aldermen, or the mayor ſingly, or before ſpecial commiſſioners appointed by the king, and afterwards entered of record: for it is not a perfect record until it be enrolled in ſome court of record. Bac. Abr. *execution*, 330.; ſee *Jeffreſon* v. *Morton*. *ante*, 7. note (5.) If the conuſee or conuſor, die within a year after the acknowledgment of a recognizance, it is neceſſary to ſue out a *ſcire facias* in order to have execution upon it. 2 Inſt. 471. 595. So if the conuſee did not take out execution within a year after the day of payment aſſigned in the recognizance, he was obliged at common law to commence an action of debt upon the recognizance, for the law preſumed the debt was paid; ſee *ante*, 6. *Jeffreſon* v, *Morton*. note (1.) but now by the ſtatute *Weſtminſter* 2. (13 Edw. 1.) St. 1. c. 45. the conuſee may ſue out a *ſcire facias* to revive the recognizance and put it in execution, if the conuſor cannot ſtay it by pleading ſuch matters as the law judges ſufficient for that end. 2 Inſt. 469. F. N. B. 595, 596, 597. 7th edit. Statutes-merchant, and recognizances in the nature of a ſtatute-ſtaple, ſeem to have an advantage over recognizances at common law in this reſpect; for it is holden that the conuſees of thoſe ſtatutes may ſue out execution *at any time* without a *ſcire facias*; or if the conuſee die, his executor may ſue out execution without a *ſcire facias*; So if the conuſor be returned dead by the ſheriff,

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fendant out of the poſſeſſion of the ſaid tenement with the appurtenances, and the ſaid plaintiff for the whole time aforeſaid, took, received and had, the rents, iſſues and profits thereof to his own uſe, and this, &c. wherefore, &c. upon which the plaintiff demurs in law.

And

ſheriff, execution it ſeems may either be taken out againſt his lands without a *ſcire facias* againſt his heir, or the conuſee may ſue it out againſt the heir and terretenants at his election. 2 Inſt. 471. 395. Bro. *ſtatute-merchant*, 16. 43. 50. Bac. Abr. *execution*. 335. *Scire facias*. 413.

So if a man acknowledge a recognizance at common law to be paid at a day within a year after, the conuſee may have execution by *fieri facias* or *elegit* within a year after the day of payment without a *ſcire facias*, though the year be paſt from the date of the recognizance. 1 Roll. Abr. 899. (O.) pl. 2. 2 Inſt. 471.

If two perſons acknowledge a recognizance jointly and ſeverally, the conuſee may ſue out ſeveral writs of *ſcire facias* againſt the conuſors. 2 Inſt. 395. And if the ſum be made payable by the recognizance at three ſeveral days, the conuſee, after the firſt day of payment is elapſed, may have execution for the ſum then due immediately, and for the other ſums as they reſpectively become due, without waiting for the laſt day of payment; and this holds as well on recognizances at common law, as by ſtatute; of which the reaſon ſeems to be becauſe they are in the nature of three ſeveral judgments. Co. Litt. 292. b. 2 Inſt. 395.

2. We will in the ſecond place conſider the recognizance which is entered into by *bail*; and that is either in an action, or upon a writ of error; and firſt as to the recognizance by bail in an action. If the action is in the common pleas, the recognizance is taken in a penalty or ſum certain, being double the amount of the ſum ſworn to, and contains a condition, that if the defendant be condemned in the action, he ſhall pay the condemnation money, or render himſelf a priſoner to the *Fleet*, or the bail will pay the money for him. Formerly the bail might enter into the recognizance jointly with the defendant, who was bound in double the amount of the ſum ſworn to, and the bail in the ſingle ſum; but now by a rule of that court, the defendant is not permitted to enter into the recognizance at all, but each of the bail muſt enter into a recognizance in double the ſum ſworn to. 1 Boſ. and Pull. 530. But if the action is by bill, the recognizance of the bail is general, that if the defendant ſhall be condemned in the action, he ſhall ſatisfy the coſts and condemnation money, or render himſelf to the cuſtody of the marſhal, or that the bail will ſatisfy them for him. Cro Jac. 645, *Appeſley* v. *Ive* Cro. Car. 482. *South* v. *Griffith*. 2 Salk. 364. *Shuttle* v. *Wood*; ſee the form of the recognizance in C P. Sell. Prac. 139. and in K. B. Tidd's *Prac. Forms*. 94. But the court will not permit the plaintiff to levy, out of the penalty of the recognizance, equitable coſts, which he had been really put to, but were not included in the judgment. 2 Str. 826. *Baldwin* v. *Morgan*.

If the principal, after judgment againſt him, does neither pay the condemnation money, nor ſurrender himſelf to priſon, a *ſcire*

And *Powys* ſerjeant, for the plaintiff, took an exception to the plea, becauſe the defendant ſays, that the plaintiff, for two years after the delivery of the tenements in execution, &c. held out the defendant, but does not ſay that the holding out was for two years next after the delivery, &c. as he ought, for perhaps the holding out was after the purchaſe of the plaintiff's writ, and then it is nothing to the purpoſe.

Kelynge

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a *ſcire facias* lies againſt the bail. 2 Lutw. 1269. *Sparks* v. *Cole*. 1279. *Baxter* v. *Peach*; but it ſeems to be clearly ſettled, that no proceedings, either by *ſcire facias*, or action of debt, can be had againſt the bail upon their recognizance, before a *capias ad ſatisfaciendum* is taken out againſt the principal, and returned *non eſt inventus*: for the bail are not bound to render the principal, until they know, by the plaintiff's ſuing out the writ of *capias ad ſatisfaciendum*, that he means to proceed againſt the perſon of the defendant. Sir *W. Jones*, 29. *Sparrow* v. *Sowgate*. Ibid. 138. *Caſe* v. *Dingley*. Cro. Car. 481. *South* v. *Gryffith*. Sty. 281. *Barcock* v. *Thompſon*. Ibid. 288. 323. S. C. 2 Lutw. 1273. *Sparks* v. *Cole*. 1 Ld. Raym. 156. *Wilmore* v. *Clerk*. 10 Mod. 267. *Weddall* v. *Jocar*. No attempt is in truth ever made to find out the principal in order to arreſt him on the *capias ad ſatisfaciendum*, but it is left at the ſheriff's office merely to give the bail notice that the plaintiff intends to proceed againſt the defendant's perſon: and therefore it is the duty of the bail to ſearch in the ſheriff's office to know whether any *capias ad ſatisfaciendum* is left there. 3 Burr. 1360. *Hunt* v. *Coxe*. But if the *capias ad ſatisfaciendum* be regularly ſued out and returned, it may be *filed* at any time, the filing being mere matter of form. 1 Lev. 225. *Gee* v. *Fane*. 3 Burr. 1360. *Hunt* v. *Coxe*. 1 Black. Rep. 593. S. C. So that if the principal dies after the return of the *capias ad ſatisfaciendum*, and before the return is *filed*, the bail are fixed, and the court will not ſtay the filing of the return. 6 Term Rep. 284. *Rawlinſon* v. *Gunſton*.

So where the principal dies after the return of the *capias ad ſatisfaciendum*, and before taking out a writ of *ſcire facias* againſt the bail, the writ may be ſued out afterwards, and the court will not ſtay the proceedings. 2 Str. 717. *Barry* v. *Barry*. S. C. 2 Ld. Raym. 1452. Or if he dies between the return of the *capias ad ſatisfaciendum*, and the return of the ſecond *ſcire facias*, the bail are liable. 1 Str. 511. *Glyn* v. *Yates*.

So the bail are liable, though the plaintiff takes a *cognovit* from the principal, without giving any notice thereof to them. 5 Term Rep. 277. *Hodgſon* v. *Nugent*. But if the plaintiff declares againſt the defendant, for a different cauſe of action from that mentioned in the writ, as where the writ is againſt the defendant as *acceptor of a bill of exchange*, and the declaration is *in covenant*, 2 H. Blac. 278. *De la Cour* v. *Read*; or from that mentioned in the affidavit to hold to bail, as where the affidavit is for money had and received by three defendants and another who is dead, and the declaration is for money had and received by the three defendants only, 6 Term Rep. 363. *Spalding* v. *Mure*; or where the affidavit is in *aſſumpſit*, and the plaintiff declares in *trover*. 7 Term Rep. 80. *Tetherington* v. *Golding*;

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Kelynge chief-juſtice anſwered, that it appears by the plaintiff's own ſhewing, that all the monies were not levied at the time the writ was purchaſed, and it alſo appears that the writ had been pending only a year; therefore the holding out was at leaſt a year before the purchaſing of the writ, and ſo there was no cauſe for the plaintiff to have reſtitution.

Saunders

Golding; or where the plaintiff ſues by *original writ* in one county, and *declares* in a different county, 3 Lev. 235. *Yates* v. *Plaintin*; in theſe caſes the bail are diſcharged. So, where the cauſe is referred to arbitration, the bail are diſcharged, unleſs a verdict be taken for the plaintiff; and therefore in that caſe an inquiry ſhould always be made whether there are bail to the action, or not.

The *capias ad ſatisfaciendum* againſt the principal ſhould be directed to the ſheriff of the county where the action was laid; and where the proceedings are by bill, there muſt be eight days, or if by original 15 days, between the *teſte* and return of the writ. 1 Salk. 602. *Ball* v. *Ruſſel*. S. C. 2 Ld. Raym. 1177. there being a proviſo in the ſtatute 13 Car. 2. St. 2. c. 2. ſ. 7. (which diſpenſes with the neceſſity of having 15 days between the *teſte* and return of a writ of *capias ad ſatisfaciendum*) that the act ſhall not extend to a writ of *capias ad ſatisfaciendum* againſt the defendant in order to make bail liable. And in order to charge the bail it muſt lie 4 days excluſive in the ſheriff's office. 2 Salk. 599. *Anon.* and be made returnable, like the former proceedings, on a day certain, or general return day.

The recognizance being forfeited upon the return of *non eſt inventus* to the *capias ad ſatisfaciendum*, the plaintiff may proceed againſt the bail and principal, if he be joined in the recognizance by *ſcire facias*, or action of debt. The plaintiff is at liberty to bring either one action of *debt* againſt all the perſons bound in the recognizance, or ſeveral actions againſt each of them; but *one ſcire facias* is ſufficient: becauſe the recognizance, upon which the *ſcire facias* is founded, being joint and ſeveral, and the purport of it being to have execution according to the form and effect of the recognizance, it therefore follows that, although the *ſcire facias* be joint, the execution may be ſeveral. 1 Lev. 225, 226. *Gee* v. *Fane*. S. C. 1 Sid. 339. Bac. Abr. *Execution*, 359.

Before an action is commenced, or *ſcire facias* ſued out, againſt the bail upon the recognizance, the bail-piece ought regularly to be filed, and an entry made of the recognizance on a roll, which ſhall be carried in and docketted. However, it is ſufficient if it be done at any time before the bail are called upon to plead, for otherwiſe they may plead *nul tiel* record; and if the recognizance-roll be not carried in until afterwards, it ſeems they may withdraw their plea, and the plaintiff ſhall pay the coſts of it. In the common pleas, and alſo in the K. B. when the proceeding is by original, the filazer enters the recognizance and dockets it; but when the proceeding is by bill, the recognizance is entered by the plaintiff's attorney after the declaration, with a memorandum of the term it is of. See the form of entry in each caſe, Tidd's *Pract Forms* 99, 100, 101, 102. 2 Sell. 45, 46.

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Saunders, for the defendant, took an exception to the record, becauſe the plaintiff in his writ ſays, *he was ready to pay* the reſidue of the money not levied, but he has not brought any money into court to tender to the defendant as he ought, and the entry of it ſhould have been after the return of the writ in this manner: "And thereupon the "plaintiff brings here into court the ſaid 68l. 4s. ready to "be paid to the defendant, if he will receive the ſame," &c.

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Qu. Whether it was ſufficient for the plaintiff to ſay that he was ready to pay the reſidue of the money, without tendering it in court?

The *ſcire facias* muſt iſſue out of the court in which the action was depending; ſee the form of it in the common pleas. 2 Rich. Prac. C. P. 404. 415. 5th edit. and in the king's bench Theſ. Brev. 229. Tidd's *Pract. Forms*, 394. 396. 398. There is a difference between a recognizance, which is in the nature of a judgment, and a bond: if a *ſcire facias* be brought, againſt two perſons only as bail, upon a recognizance acknowledged by them and the principal jointly and ſeverally, it will be bad on demurrer, and the writ ſhall abate, becauſe, being founded upon a record, the plaintiff ought to ſet forth the cauſe of the variance from the record, as that the principal was dead. But if an action be brought upon a joint and ſeveral bond againſt two only, where there are three or more obligors, the defendants ought to plead in abatement that it was made by them and others in full life not named in the writ; for the court will not intend that the bond was ſealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered in *hæc verba*. All. 21. *Blackwell* v. *Aſhton*. See 1 Saund. 291. *Cabell* v. *Vaughan*, note (1).

Although a recognizance of bail be taken actually by a judge of the K. B. at his chambers in Serjeants' Inn, yet the courſe of the K. B. is to enter it *as taken in court*, the recognizance not being obligatory in that court by the caption, but by its being entered of record; therefore in the K. B. a *ſcire facias* or action of debt, muſt be brought in *Middleſex* where the record is, and not elſewhere; but in the C. B. the recognizance is a record immediately *upon the caption* by a judge of the C. B. at his chambers, and binds the lands of the conuſors before it is filed at *Weſtminſter*; and when filed it is a record in court, and a *ſcire facias* or debt lies upon it, either in *Middleſex* where it is filed, or in *London* where it was taken. And if the declaration in *ſcire facias*, or debt, ſtate that the recognizance was taken in the *court of C. B.*, and upon *nul tiel record* pleaded, the recognizance certified appear to have been taken by one of the judges of the C. B. *at his chambers*, and afterwards delivered by him into court to be inrolled, it is a fatal variance, and a failure of the record. 2 Salk. 564. *Shuttle* v. *Wood*. S.C. Ibid. 600. 659. 6 Mod. 42. Hob. 195. *Hall* v. *Winckfield*. S.C. 1 Brownl. 69. Sty. 9. *Andrew's* caſe. S.C. All. 12. 2 Lutw. 1287. *Redman* v. *Idle*. 2 Black. Rep. 768. *Kenny* v. *Thornton*. And ſuch variance cannot be amended after the defendant has pleaded *nul tiel record*, for there may be a recognizance that agrees with it. 1 Salk. 52. *Buckſom* v. *Hoſ-*

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&c. but it not being ſo, the defendant will loſe theſe monies which, by the plaintiff's own ſhewing, were due to him and not levied, if judgment ſhall be given for the plaintiff upon this record; and for this fault of the plaintiff, in not tendering the money in court, he ſaid, the plaintiff cannot have judgment if the plea had been bad (5). But the court did not pay

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v. *Hoſkins*. See the proper form of declaring upon a *ſcire facias* taken before a judge at chambers. Brownl. Rediv. 433.

Next as to the recognizance by bail on a writ of error: by ſtatute 3. Jac. 1. c. 8. the plaintiff in the writ of error muſt be bound, with two ſufficient ſureties, to the perſon for whom the judgment is given, by recognizance in double the ſum adjudged to be recovered by the former judgment, to proſecute a writ of error with effect, and alſo to ſatisfy and pay, if the judgment be affirmed, all and ſingular the debts, damages and coſts adjudged upon the former judgment, and all coſts and damages to be awarded for the delaying of execution. Poſt. 101. i. See the form of the entry of recognizance of bail on error from the king's bench to the exchequer chamber. Tidd's *Prac. Forms*, 477. Therefore if the judgment be affirmed, or the plaintiff do not proſecute the writ, and in conſequence thereof it be nonproſſed or diſcontinued, the defendant in error may ſue the bail upon their recognizance either by action of debt, or *ſcire facias*, at his election, The writ of *ſcire facias* is made out by the clerk of the errors, and on a recognizance taken in the K. B. the writ recites not only the recognizance, but the condition of it, and the affirmance of the judgment; ſee the form of the writ, Tidd's *Prac. Forms*, 400.; but on a recognizance taken in the C. B., the *ſcire facias* only ſtates the recognizance, and the non-payment of the ſum acknowledged to be due; ſee the form of the laſt mentioned writ, Tidd's *Prac. Forms*, 399. for in that court the condition of the recognizance in error is not incorporated, as it is in a recognizance of bail on a *capias ad reſpondendum*, but is ſubſcribed by way of defeaſance, ſo that the recognizance and condition are two diſtinct records. Barnes, 93. *Malland* v. *Jenkins*. 339. *Croſſe* v. *Porter*. Beſides which, if the condition were ſtated, it would alſo be neceſſary to ſtate the affirmance of the judgment, which might occaſion a difficulty, if the bail ſhould plead *nul tiel record* of the judgment of affirmance, which remains in the king's bench. Tidd's *Prac.* K. B. 1022. 2d edit.

In this caſe a render will not excuſe the bail, therefore there is no occaſion to ſue out a *capias ad ſatisfaciendum* in order to proceed againſt them. The *ſcire facias* againſt the bail in error muſt be brought in the court where the recognizance was taken, unleſs it was taken in the common pleas, and then the *ſcire facias* may be brought either there, or in the king's bench to which the record is removed; a *certiorari* lying to remove the recognizance of bail in error to the king's bench, after the judgment is affirmed there. 4 Mod. 104. *Barſdale* v. *Drew*. 1 Show. 343. Comb. 199 S. C. The form of the *ſcire facias* when brought in the king's bench may be ſeen in Lill. Ent. 343.

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pay much regard to this objection, but for the reaſon of the chief juſtice they held the plea good; wherefore it was adjudged for the defendant.

Note; There was no queſtion about the matter of law, namely, that, if the party himſelf holds out the tenant by *elegit* from the tenements extended, the tenant by *elegit* may hold

3. As to a *ſcire facias* upon a judgment; and that is either by or againſt the ſame, or different parties. This writ is given by the ſtatute of *Weſtminſter* 2. (13 Edw. 1) c. 45. to the plaintiff in a perſonal action to revive the judgment, where he has omitted to ſue out execution within a year after judgment obtained; ſee ante, p. 6. *Jeffreſon* v. *Morton*, note (1.) It is now ſettled that a *ſcire facias* lies on a judgment *in ejectment*, for the words of the ſtatute above-mentioned are "*vel alia quæcumque irrotulata*," which comprehend all judgments, and give the like remedy on them by *ſcire facias*, as the demandant had on a judgment in a real action at common law. 2 Salk. 600. *Proctor* v. *Johnſon*. Bac. Abr. *execution*, 360. The reaſon, why the plaintiff is put to his *ſcire facias* after the year, is, becauſe where he lies by ſo long after his judgment, it ſhall be preſumed that the judgment is executed, or that the plaintiff has releaſed the execution, and therefore the defendant is not to be diſturbed without being called upon, and having an opportunity of pleading that the judgment is executed, or the releaſe, or ſhewing other cauſe, if he can, why execution ſhould not iſſue againſt him. Ibid. The year muſt be computed from the day of ſigning judgment. Barnes, 97. *Sympſon* v. *Gray*, and is to be reckoned by calendar months, and not by terms. 1 Str. 301 *Winter* v. *Lightbound*.

But although the general rule be, that the plaintiff cannot take out execution after the year without a *ſcire facias*, yet the rule muſt be underſtood with ſome qualification; for if the defendant brings a writ of error, and thereby hinders the plaintiff from taking out execution within the year, and the plaintiff in error is nonſuited, or the writ of error abated or diſcontinued, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*; becauſe the writ of error was a *ſuperſedeas* to the execution, and the defendant in error muſt wait until it be determined. 2 Inſt. 471. 5 Rep 88. *Garnon*'s caſe. Cro. Eliz. 416. *Goodwin* v. *Grudge*. 1 Roll. Abr. 899. (N) pl 9. Carth. 237. *Howard* v. *Pitt*. 6 Mod. 288. *Booth* v. *Booth*. S. C. 1 Salk. 322. Lane, 20. *Dennis* v. *Drake*. Bac. Abr. *execution*, 362. And if the year had expired *before* the writ of error was ſued out, and the judgment is affirmed, or the plaintiff in error is nonſuited, or the writ of error is diſcontinued, the plaintiff may ſue out execution without a *ſcire facias*, for the writ of error revived the judgment. Cro. Jac. 364. *Bellaſis* v. *Hanford*. S. C. 1 Roll. Rep. 104. 1 Roll. Abr. 899.

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&c. but it not being ſo, the defendant will loſe theſe monies which, by the plaintiff's own ſhewing, were due to him and not levied, if judgment ſhall be given for the plaintiff upon this record; and for this fault of the plaintiff, in not tendering the money in court, he ſaid, the plaintiff cannot have judgment if the plea had been bad (5). But the court did not pay

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v. *Hoſkins*. See the proper form of declaring upon a *ſcire facias* taken before a judge at chambers. Brownl. Rediv. 433.

Next as to the recognizance by bail on a writ of error: by ſtatute 3. Jac. 1. c. 8. the plaintiff in the writ of error muſt be bound, with two ſufficient ſureties, to the perſon for whom the judgment is given, by recognizance in double the ſum adjudged to be recovered by the former judgment, to proſecute a writ of error with effect, and alſo to ſatisfy and pay, if the judgment be affirmed, all and ſingular the debts, damages and coſts adjudged upon the former judgment, and all coſts and damages to be awarded for the delaying of execution. Poſt. 101. i. See the form of the entry of recognizance of bail on error from the king's bench to the exchequer chamber. Tidd's *Prac. Forms*, 477. Therefore if the judgment be affirmed, or the plaintiff do not proſecute the writ, and in conſequence thereof it be nonproſſed or diſcontinued, the defendant in error may ſue the bail upon their recognizance either by action of debt, or *ſcire facias*, at his election, The writ of *ſcire facias* is made out by the clerk of the errors, and on a recognizance taken in the K. B. the writ recites not only the recognizance, but the condition of it, and the affirmance of the judgment; ſee the form of the writ, Tidd's *Prac. Forms*, 400.; but on a recognizance taken in the C. B., the *ſcire facias* only ſtates the recognizance, and the non-payment of the ſum acknowledged to be due; ſee the form of the laſt mentioned writ, Tidd's *Prac. Forms*, 399. for in that court the condition of the recognizance in error is not incorporated, as it is in a recognizance of bail on a *capias ad reſpondendum*, but is ſubſcribed by way of defeaſance, ſo that the recognizance and condition are two diſtinct records. Barnes, 93. *Malland* v. *Jenkins*. 339. *Croſſe* v. *Porter*. Beſides which, if the condition were ſtated, it would alſo be neceſſary to ſtate the affirmance of the judgment, which might occaſion a difficulty, if the bail ſhould plead *nul tiel record* of the judgment of affirmance, which remains in the king's bench. Tidd's *Prac.* K. B. 1022. 2d edit.

In this caſe a render will not excuſe the bail, therefore there is no occaſion to ſue out a *capias ad ſatisfaciendum* in order to proceed againſt them. The *ſcire facias* againſt the bail in error muſt be brought in the court where the recognizance was taken, unleſs it was taken in the common pleas, and then the *ſcire facias* may be brought either there, or in the king's bench to which the record is removed; a *certiorari* lying to remove the recognizance of bail in error to the king's bench, after the judgment is affirmed there. 4 Mod. 104. *Barſdale* v. *Drew*. 1 Show. 343. Comb. 199 S. C. The form of the *ſcire facias* when brought in the king's bench may be ſeen in Lill. Ent. 343.

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pay much regard to this objection, but for the reaſon of the chief juſtice they held the plea good; wherefore it was adjudged for the defendant.

Note; There was no queſtion about the matter of law, namely, that, if the party himſelf holds out the tenant by *elegit* from the tenements extended, the tenant by *elegit* may hold

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3. As to a *ſcire facias* upon a judgment; and that is either by or againſt the ſame, or different parties. This writ is given by the ſtatute of *Weſtminſter* 2. (13 Edw. 1) c. 45. to the plaintiff in a perſonal action to revive the judgment, where he has omitted to ſue out execution within a year after judgment obtained; ſee ante, p. 6. *Jeffreſon* v. *Morton*, note (1.) It is now ſettled that a *ſcire facias* lies on a judgment *in ejectment*, for the words of the ſtatute above-mentioned are "*vel alia quæ-*"*cumque irrotulata*," which comprehend all judgments, and give the like remedy on them by *ſcire facias*, as the demandant had on a judgment in a real action at common law. 2 Salk. 600. *Proctor* v. *Johnſon*. Bac. Abr. *execution*, 360. The reaſon, why the plaintiff is put to his *ſcire facias* after the year, is, becauſe where he lies by ſo long after his judgment, it ſhall be preſumed that the judgment is executed, or that the plaintiff has releaſed the execution, and therefore the defendant is not to be diſturbed without being called upon, and having an opportunity of pleading that the judgment is executed, or the releaſe, or ſhewing other cauſe, if he can, why execution ſhould not iſſue againſt him. Ibid. The year muſt be computed from the day of ſigning judgment. Barnes, 197. *Sympſon* v. *Gray*, and is to be reckoned by calendar months, and not by terms. 1 Str. 301 *Winter* v. *Lightbound*.

But although the general rule be, that the plaintiff cannot take out execution after the year without a *ſcire facias*, yet the rule muſt be underſtood with ſome qualification; for if the defendant brings a writ of error, and thereby hinders the plaintiff from taking out execution within the year, and the plaintiff in error is nonſuited, or the writ of error abated or diſcontinued, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*; becauſe the writ of error was a *ſuperſedeas* to the execution, and the defendant in error muſt wait until it be determined. 2 Inſt. 471. 5 Rep 88. *Garnon*'s caſe. Cro. Eliz. 416. *Goodwin* v. *Grudge*. 1 Roll. Abr. 899. (N) pl 9. Carth. 237. *Howard* v. *Pitt*. 6 Mod. 288. *Booth* v. *Booth*. S. C. 1 Salk. 322. Lane, 20. *Dennis* v. *Drake*. Bac. Abr. *execution*, 362. And if the year had expired *before* the writ of error was ſued out, and the judgment is affirmed, or the plaintiff in error is nonſuited, or the writ of error is diſcontinued, the plaintiff may ſue out execution without a *ſcire facias*, for the writ of error revived the judgment. Cro. Jac. 364. *Bellaſis* v. *Hanford*. S. C. 1 Roll. Rep. 104. 1 Roll. Abr. 899.

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hold over: but otherwiſe, if a ſtranger holds out the tenant by *elegit*; for there the tenant by *elegit* ſhall not hold over againſt the reverſioner, but is put to his action of treſpaſs againſt the ſtranger, as fully appears in Sir *Andrew Corbet*'s (*c*) caſe (6).

(*c*) 4 Rep. 82. b.

899. (N) pl 3, 4, 5. Lane, 20. 1 Show. 402. 403. *Howard* v. *Pitt.*

So if the plaintiff has judgment with a *ceſſet executio*, or ſtay of execution for a year, he may after the year take out his execution without a *ſcire facias*, becauſe the delay is by conſent of parties, and in favour of the defendant. 6 Mod. 288. *Booth* v. *Booth*. S. C. 1 Salk. 322. Bac. Abr. *execution*, 362. It was formerly holden, that if the plaintiff had been tied up by injunction out of chancery for a year, he could not take out execution without a *ſcire facias*, becauſe courts of law do not take notice of chancery injunctions as they do of writs of error, 6 Mod. 288. 1 Salk. 322. Bac. Abr. *execution*, 363. 1 Str. 301. *Winter* v. *Lightbound*: but it has been ſince decided, that if the plaintiff has been prevented from ſuing out execution within the year by the defendant's obtaining an injunction out of chancery, he may ſue out execution afterwards without a *ſcire facias*. 2 Burr. 660. *Michel* v. *Cue*. So where a *fieri facias*, or *capias ad ſatisfaciendum* is taken out within the year, and not executed, a new writ of execution may be ſued out at any time afterward without a *ſcire facias*, provided the firſt writ be returned and filed, and continuances entered from the time of iſſuing it: ſee *ante*, 68. continuation of note (1.) And the continuances may be entered after the iſſuing of the ſecond writ, unleſs a rule be made upon motion for the proceedings to remain *in ſtatu quo*. Tidd's Prac. 1028. 2d edit. If the judgment be under ſeven years old, the plaintiff may ſue out a *ſcire facias* as a matter of courſe without any rule, or motion; if it be above ſeven years, but under ten, he cannot have a *ſcire facias* without a ſide-bar rule; 2 Salk. 598. *Hardiſty* v. *Barny*: but if it be above ten years old, but under twenty, there muſt be a motion under counſel's hand, ſupported by an affidavit that the judgment is unſatisfied: and if the judgment be of more than twenty years ſtanding, there muſt be a rule to ſhew cauſe on a ſimilar affidavit. Tidd's Prac. 404 note (g.) and 1031. 2d edit. The *ſcire facias* muſt be ſued out of the ſame court where the judgment was given if the record remains there. Com. Dig. *Pleader*. (3 L. 3.) or if it be removed, then out of the court where the record is. See the form of a *ſcire facias* upon a judgment after a year. Theſ. Brev. 224. Tidd's *Prac. Forms*, 418, 419, 420, 421. This being a judicial writ, muſt purſue the nature of the judgment, therefore if a joint judgment be obtained againſt two, the *ſcire facias* muſt be againſt both. 2 Salk. 598. *Panton* v. *Hall*. S. C. Carth. 105.

If the judgment of an inferior court is removed into the king's bench by *certiorari*, or by writ of error, it muſt appear in the writ of *ſcire facias* upon ſuch judgment, how it came into the king's bench; for if it came in by *certiorari*, the *ſcire facias* ought to ſhew the

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particular limits of the inferior juriſdiction, and pray execution within thoſe limits. But if the judgment be removed into the king's bench by writ of error and affirmed, the party may have execution in any part of *England, for by the affirmance it is become the judgment of the king's bench 1 Ld Raym. 216. *Gulliam* v. *Hardy*. S. P. 1 Lev. 134. *Herbert* v. *Alcocke*. If, after the judgment has been revived by *ſcire facias*, the plaintiff do not take out execution within a year, or the defendant die before execution, the plaintiff muſt ſue out a new *ſcire facias*, but may have it without motion, for the judgment was revived before. 2 Salk. 598 *Hardiſty* v. *Barny*. Tidd's Prac. 1034.

In debt on bond conditioned for the payment of money by inſtalments, where the proceedings are ſtayed on payment of one or more of the inſtalments, judgment is entered as a ſecurity for the remainder with a ſtay of execution till they become due; and in ſuch caſe there ſeems to be no neceſſity for a *ſcire facias*, if execution be taken out within a year after each default. 2 Str. 957. *Darby* v *Wilkins*. S. P. 2 Black. Rep. 706. *Maſſen* v. *Touchet*.

Where judgment is entered in an action of debt on bond, or on any penal ſum, for non performance of covenants or agreements contained in any indenture, deed or writing, we have already obſerved (ſee 1 Saund. 58. *Gainsford* v. *Griffith*, note (1.) that by the ſtatute 8 & 9 W. 3. c. 11. ſ. 8. it remains as a ſecurity to anſwer ſuch damages as ſhall or may be ſuſtained by a further breach of any covenant contained in the ſame indenture, deed, or writing; and the plaintiff may have a *ſcire facias* upon the judgment ſuggeſting other breaches of the ſaid covenants or agreements. See the form of the *ſcire facias*, Tidd's Prac. Forms, 430.

By ſtatute 5 Geo. 2. c. 30. ſ. 9. it is enacted "that in caſe any commiſſion "of bankruptcy ſhall iſſue againſt any "perſon or perſons who ſhall have been "diſcharged by virtue of that act, or "ſhall have compounded with his, her, "or their creditors, or delivered to "them his, her or their eſtate or effects, "and been releaſed by them, or been "diſcharged by any act for the relief "of inſolvent debtors, then and in either "of thoſe caſes, the body and bodies "only of ſuch perſon and perſons con-"forming as therein mentioned ſhall be "free from arreſt and impriſonment "by virtue of that act; but the future "eſtate and effects of every ſuch perſon "and perſons ſhall remain liable to his, "her, or their creditors, as before the "making of that act, (the tools of trade, "the neceſſary houſehold goods and "furniture, and neceſſary wearing ap-"parel of ſuch bankrupt and his wife "and children only excepted) unleſs "the eſtate of ſuch perſon or perſons "againſt whom ſuch commiſſion ſhall "be awarded, ſhall produce clear of all "charges, ſufficient to pay every cre-"ditor under the ſaid commiſſion, fifteen "ſhillings in the pound for their reſpec-"tive debts." Although a prior commiſſion has been ſuperſeded by conſent, yet a ſecond bankruptcy does not protect future effects, unleſs fifteen ſhillings in the pound are paid under the ſecond commiſſion. Doug. 46. *Thornton* v. *Dallas*.

If judgment be obtained againſt a bankrupt before he has had his certificate under the ſecond commiſſion, it is a general one; but if given afterwards it

it may be ſpecial againſt his future eſtate and effects with the exception of his tools of trade, neceſſary houſehold goods &c. as mentioned in the ſtatute. The plaintiff cannot, on a *general* judgment, ſue out a *ſpecial* execution againſt the future effects of the bankrupt, for the execution muſt follow the judgment, and be warranted by it, 1 Term Rep 80 *Buxton* v. *Mardin*, but muſt proceed by *ſcire facias*. That writ muſt ſtate the judgment, and the circumſtances which make the defendant's future eſtate and effects liable to ſatisfy it; as that he was before a bankrupt, or had compounded with his creditors, &c. and particularly it is neceſſary to aver, that the bankrupt's eſtate had not paid fifteen ſhillings in the pound under the ſecond commiſſion at the time of ſuing out the writ of *ſcire facias*; for the words of the act, "that the future eſtate and effects of "ſuch perſon ſhall be liable to his cre- "ditors, *unleſs* the eſtate ſhall produce "ſufficient to pay fifteen ſhillings in the "pound, &c." being in the enacting clauſe, it has been holden, that the *ſcire facias* muſt negative that exception; according to the diſtinction taken by Treby C. J. in *Jones* v. *Axen*. 1 Ld. Raym. 120. who ſays "the difference "is, that where an exception is incor- "porated in the body of the clauſe, "he who pleads the clauſe, ought alſo "to plead the exception; but when "there is a clauſe for the benefit of the "pleader, and afterwards follows a "proviſo which is againſt him, he ſhall "plead the cauſe, and leave it to the "adverſary to ſhew the proviſo." 7 Term. Rep. 27. *Gill* v. *Scrivens*. 1 Saund. 358. note. The *ſcire facias* muſt then ſtate that the defendant has become ſeiſed or poſſeſſed of ſome eſtate or effects, and commands the ſheriff that he make known to the defendant to appear in court at the return day, to ſhew cauſe why the plaintiff ſhould not have execution of the debt or damages, to be levied of the eſtate and effects, whereof the defendant has become ſeiſed or poſſeſſed, ſince the obtaining of his certificate under the laſt commiſſion, except his tools, &c. Ibid.

By the lords' act 32 Geo. 2 c. 28. ſ. 20. it is provided, that "notwithſtand- "ing any diſcharge obtained by virtue "of that act for the perſon of any ſuch "priſoner, the judgment obtained "againſt every ſuch priſoner ſhall con- "tinue and remain in force, and exe- "cution may at any time be taken out "thereon againſt the lands, tenements, "rents or hereditaments. goods or "chattels of any ſuch priſoner, other "than except the neceſſary wearing "apparel and bedding for himſelf and "family, and the neceſſary tools for the "uſe of his trade or occupation, not "exceeding 10l. in value in the whole, "as if he had never been before arreſ- "ted, taken in execution and releaſed "out of priſon by virtue of that act."

In like manner, and for the ſame reaſon, it has been holden that no *ſpecial* execution can be taken out on a *general* judgment obtained againſt a defendant, before his diſcharge under an inſolvent act, without firſt ſuing out a *ſcire facias*. 1 Term Rep. 80. *Buxton* v. *Mardin*; in which caſe it was adjudged, that a warrant of attorney to confeſs a judgment having been given before an inſolvent act was made, which the defendant was intitled to plead in diſcharge of his perſon, &c. a *general* judgment ſigned under ſuch warrant of attorney after the defendant's diſcharge did not warrant a *ſpecial* execution under the act, for the execution muſt follow the judgment;

but the plaintiff muſt bring a *ſcire facias*. And it has been determined, that the effects acquired by an inſolvent after his diſcharge under ſtatute 34 Geo. 3. c. 69. are not protected by the 31ſt ſection of that ſtatute, which exempts only the perſons of ſuch as are diſcharged under it from impriſonment for prior debts, but leaves the *effects* which they acquired after their diſcharge liable to be taken in execution for a debt due before. 6 Term Rep. 366. *Spalton* v. *Moorhouſe*.

In the next place, let us conſider the writ of *ſcire facias* on a judgment by or againſt different parties.

We have already obſerved (*ante*, 6. *Jeffreſon* v. *Morton*, note 1.) that the rule in this caſe is, that where a new perſon, who was not a party to a judgment, derives a benefit by, or becomes chargeable to the execution of it, there muſt be a *ſcire facias* to make him a party to the judgment, 1 Ld. Raym. 245. *Penoyer* v. *Brace*. S. C. 1 Salk. 319, 320. 2 Ld. Raym. 768. *Queen* v. *Ford*. 2 Inſt. 471. On this rule are founded the caſes of ſurvivorſhip, marriage, bankruptcy and death; and firſt of ſurvivorſhip.

At the common law in all actions, where there are two or more plaintiffs or demandants, the death of one of them pending the ſuit, that is, before final judgment, is an abatement of the action, though the property ſurvives to the other, except in a few caſes, ſuch as in a *quare impedit* by two, where out of neceſſity the death of one does not abate the ſuit, for the ſix months may paſs, or a lapſe incur, before the ſurvivor can bring another action, and therefore, if the writ abates, the action will fail; or in an *auditâ querela* by two, for it is only in diſcharge; or in debt by two executors, where one was ſummoned and ſevered, and dies, the writ does not abate. 10 Rep. 134. *Read* and *Readman*'s caſe. Cro. Jac. 19. *Leigh* v. *Brown*. 2 Lev. 82. *Dacres* v. *Dunkin*. S. C. 1 Vent. 235. Sir T. Raym. 463. *Wedgewood* v. *Baily*. 3 Mod. 249. *Capel* v. *Saltonſal*; and the caſe of *Spring* v. *Barrett*. 2 Bulſ. 262. to the contrary, was denied in Sir T. Raym. 463. So where there are two or more tenants, or defendants, the death of one of them, pending the action, abates the ſuit. Bro. Brief. 295. Cro. Car. 574, 583. 589. *The king* v. *Dryden*. 1 Show. 56. *Dove* v. *Martin*. 1 Leon. 44. *Knight*'s caſe. Plow. 186. b. *Woodward* v. *Lord Darcey*. Sir T. Raym. 131. *Worral* v. *Brand*. S. C. 1 Lev. 165. 1 Sid. 259. But the action does not abate by the death of one of the tenants, or defendants, when the other has the whole by ſurvivorſhip. Cro. Car. 574. *The king* v. *Dryden*. Hard. 113. *Young* v. *Woolaſton*. Nor where the action is founded on a *tort*, as in treſpaſs, ejectment, trover, conſpiracy, and the like, againſt two, and one dies, though they are charged jointly. Bro. Brief. 80. Yelv. 209. *Spencer* v. *Rutland*. 2 Lev. 82. Sir T. Raym. 131. 463. Cro. Eliz. 145. *Hill* v. *Tempeſt*. Cro. Jac. 19. Moor 469. *Griffin* v. *Lawrence*. Cro. Jac. 356. *Rigley* v. *Lee*. Hard. 161. *Harris* v. *Phillips*. Cro. Eliz. 625. *Benniſon* v. *Watſon*, and even where the action is founded on a *tort*, as in treſpaſs, if one of the defendants was dead at the time of the commeneement of the ſuit, the writ ſhall abate, becauſe it was always falſe. Bro. Brief. 175. Hard. 114. *Young* v. *Woolaſton*. But now by ſtatute 8 and 9 W. 3. c. 11. ſ. 7. it is enacted, "that if there be two or more "plaintiffs or defendants, and one or "more of them ſhould die, if the cauſe

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" of ſuch action ſhall ſurvive to the ſur-
" viving plaintiff or plaintiffs, or againſt
" the ſurviving defendant or defend-
" ants, the writ or action ſhall not be
" thereby abated; but ſuch death being
" ſuggeſted upon the record, the ac-
" tion ſhall proceed at the ſuit of the
" ſurviving plaintiff or plaintiffs againſt
" the ſurviving defendant or defend-
" ants." In this caſe, if the death happen before iſſue joined, it ſhould be ſuggeſted in making up the iſſue, but otherwiſe it is not neceſſary to ſuggeſt it till the plea-roll is made up. 1 Burr. 362. *Far* v. *Denn.* And where one of two plaintiffs died before interlocutory judgment, but the ſuit went on to execution in the name of both, the plaintiff was permitted, even after a motion to ſet aſide the proceedings for this irregularity, to ſuggeſt the death of the other on the roll, and to amend the *capias ad ſatisfaciendum*, without paying coſts, 5 Term Rep. 577. *Newnham* v. *Law.* But as no new perſon is introduced, there is no occaſion in theſe caſes to revive the judgment. Tidd's Prac. 1047.

If one of ſeveral defendants dies after judgment, and before execution, it was formerly holden, that a *ſcire facias* muſt be brought againſt the perſonal repreſentative of the deceaſed. Yelv. 208. *Spencer* v. *Rutland*; but this caſe is denied to be law by Lord *Holt.* Comb. 441. *Pennoyer* v. *Brace.* Afterwards it was determined that, where it is neceſſary to revive the judgment, before the plaintiff can take out execution, a *ſcire facias* would lie againſt the ſurvivor alone, reciting the death, and that he could not plead that the *heir* of the deceaſed had aſſets by deſcent, and pray judgment if he ought to be charged alone; for at common law the charge upon the judgment being perſonal ſurvives; (ſee *ante*, 50. the caſe of *Norton* and *Harvey* cited in *Trethewy* v. *Ackland.*) And the ſtatute of *Weſtminſter* 2. which gives an *elegit*, does not take away the privilege of the plaintiff, but he may ſtill have execution at the common law, if he pleaſes: but if he ſhould after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by ſuggeſtion, or elſe by *auditâ querelâ*, or perhaps upon motion. Sir T. Raym. 26. *Eddar* v. *Smart* S. C. 1 Lev. 30 and S. C. cited Carth. 106. *Panton* v *Hall.* 3 Bac. Abr. 698. 4 Bac. Abr. 419; ſee *ante*, 51. note (4,) But it ſeems clear that where there are two or more plaintiffs or defendants in a perſonal action, and or more of them die after judgment, execution by *fi: fa:* or *ca: fa:* may be had within the year for or againſt the ſurvivors without a *ſcire facias.* Moor. 367. *Iſam's* caſe. 1 Ld. Raym. 244. *Pennoyer* v. *Brace.* S. C. 1 Salk. 319. Carth. 404. Comb. 441. 5 Mod. 338. 1 Show. 402. *Howard* v. *Pitt.* 7 Mod. 68. *Withers* v. *Harris.* S. P. But the execution muſt agree with the judgment, and therefore the execution muſt be ſued out in the joint names of all the plaintiffs, or defendants, otherwiſe it will not be warranted by the judgment. 1 Ld. Raym. 244. *Pennoyer* v. *Brace.* S. C. 1 Salk. 319. Although the execution on a joint judgment muſt be joint, yet it may be levied upon one only, and he may have contribution againſt the others. 5 Term Rep. 556. *Herries* v. *Jamieſon.* Bro. *Execution*, 10.

Next of marriage. If a feme ſole obtain judgment, or if a judgment be recovered againſt her, and ſhe marry before execution, a *ſcire facias* muſt be brought by or againſt huſband and wife, in order to execute the judgment. See the form of the *ſcire facias* by huſband and wife. Tidd's *Prac. Forms*, 439. 2 Rich. Prac. C. P. 402. Theſ. Brev.

Brev. 256. 265. Clift. 681. and againſt huſband and wife. Tidd's *Prac. Forms*, 440. Theſ Brev. 247. 251. It is not neceſſary to lay a venue where the marriage was ſolemnized, it being a matter of ſurmiſe, to which no venue is neceſſary. 2 Str. 775. *Blake* v. *Dodemead*. S. C. 2 Ld Raym. 1501. If a verdict be found on a plea of coverture for the wife, who has been ſued as a feme ſole, it has been determined, that it is irregular to ſue out execution for the coſts, in the name of huſband and wife, without a *ſcire facias*; but the wife may take out execution in her own name, becauſe the plaintiff, having declared againſt her as ſole, is concluded from denying it. Dougl. 637. *Wortley* v. *Rayner*.

If huſband and wife obtain judgment for a debt due to the wife before marriage, and the wife die before execution, the huſband alone may have a *ſcire facias* without taking out adminiſtration; or may, it ſeems, ſue out execution in the name of himſelf and wife without a *ſcire facias*, for the nature of the debt is altered by the judgment, and it is become a debt due to the huſband. Cro. Eliz. 844. *Butler* v. *Delt*. 1 Sid. 337. *Eyres* v. *Coward*. 1 Mod. 179. *Miles*'s caſe. Cro. Car. 208. *Beamond* v. *Long*. 3 Mod. 189. *Obrian* v. *Ram*. 4 Bac. Abr. 420. If judgment be recovered by a feme ſole, and ſhe marry, and then the huſband and wife ſue out a *ſcire facias* upon the judgment, and have an award of execution, and afterwards the wife die, the huſband alone may have a *ſcire facias* to execute the judgment; 1 Salk. 116. *Woodyer* v. *Greſham*. S. C. Skin. 642. Comb. 455. Carth. 415.

And in like manner if a *ſcire facias* is brought againſt huſband and wife upon a judgment recovered againſt her when ſole, and execution is awarded thereon againſt both, and afterwards the wife dies, a *ſcire facias* may be ſued out againſt the huſband after her death to have execution of the judgment againſt him. 3 Mod. 186. *Obrian* v. *Ram*. S. C. Carth. 40[illegible]. Comb. 103. S. C. cited Comb 4 5. 1 Salk 116. Skin. 683. 4 Bac. Abr. 420. But if huſband and wife recover judgment for a debt due to the wife as executrix, and the wife die, the huſband ſhall not have a *ſcire facias* upon the judgment, but the ſucceeding executor or adminiſtrator. Cro. Car. 208. 227. *Beamond* v. *Long*. Sir *W. Jones*, 248. S. C.

So if a man obtain interlocutory judgment, and become a *bankrupt* before final judgment, his aſſignees may proceed to final judgment in his name, and then ſue out a *ſcire facias* in their own name to have execution. 2 Wilſ 372. *Hewit* v. *Mantell*. So if a man recover final judgment, upon which defendant brings a writ of error, and the plaintiff become a bankrupt pending the writ of error, his aſſignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then ſue out a *ſcire facias* in their own names upon the judgment to have execution. 4 Term Rep. 463. *Kretchman* v. *Beyer*. 2 Term. Rep. 45. *Winter* v. *Kretchman*. 1 Mod. 93. *Monk* v. *Morris*. 1 Vent. 193. S. C. 2 Wilſ. 372. 378. *Hewit* v. *Mantell*. However, where the plaintiff became a bankrupt between interlocutory and final judgment, and took out execution in his own name, though regularly the aſſignees ought to have brought a *ſcire facias* on the final judgment, and have ſued out execution in their own name, yet the court refuſed to interfere

to ſet aſide the proceedings. 3 Term Rep. 437. *Waugh* v. *Auſten* And it is ſufficient if the *ſcire facias* by the aſſignees ſtate, generally that he became a bankrupt within the true intent and meaning of the ſtatutes, &c. and that his goods and effects were afterwards in due manner aſſigned to the plaintiffs, without alleging that the party was declared a bankrupt, or his effects aſſigned by deed. 2 Term Rep. 45. *Winter* v. *Kretchmam.* See the form of the writ. Tidd's *Pract. Forms*, 440.

And laſtly as to *death*: which may be conſidered either as it happens before, or after final judgment. At common law the death of the plaintiff or defendant, at any time before *final* judgment, would have abated the ſuit. But now by ſtatute 17 Car. 2. c. 8. ſ. 1. it is enacted, that "in all actions perſonal, real or mixt, the "death of either party *between the verdict and the judgment*, ſhall not be "alledged for error, ſo as ſuch judgment "be entered within two terms after "ſuch verdict." It is holden, that the death of either party *before* the aſſizes is not remedied; but if the party die *after the aſſizes begin*, though the *trial* be after his death, it is within the remedy of the ſtatute; for the aſſizes are but one day in law, and this is a remedial law and ſhall be conſtrued favourably. 1 Salk 8. *Anon.* 7 Term Rep. 32. note (a.) And in like manner and for the like reaſon it was adjudged, that if the defendant die after the firſt day of the *ſittings*, and before the trial, it is remedied. 7 Term Rep. 31. *Jacobs* v. *Miniconi.* The judgment upon this ſtatute is entered by or againſt the party, as if he were living. 1 Salk. 42. *Weſton* v. *James*, and it ſhould be entered, or at leaſt ſigned, within two terms after the verdict; for ſigning the judgment is an entering of it within the ſtatute; 1 Sid. 385. *Helie* v. *Baker* Barnes, 261. *Webb* v. *Spurrell*; but there can be no execution without a *ſcire facias* to revive the judgment. 1 Wilſ. 302. *Earl* v. *Brown.* And as the judgment is general againſt the party, as if he were living at the time it was entered, ſo the *ſcire facias* muſt follow the judgment, and recite it as if it had been entered in his life time; or in other words, the *ſcire facias* muſt be in the uſual form the writ is conceived in, when brought by or againſt the perſonal repreſentatives of a perſon againſt whom a judgment has been obtained. 2 Ld. Raym. 1280. *Colebeck* v. *Peck.* See 1 Lev. 277. *Burnett* v. *Holden.*

By a ſubſequent ſtatute, 8 and 9 W. 3. c. 11. ſ. 6. it is enacted, "that in all "actions to be commenced in any court "of record, if the plaintiff or defendant "happen to die, after interlocutory and "before final judgment, the action ſhall "not abate by reaſon thereof, if ſuch "action might be originally proſecuted "or maintained by or againſt the executors or adminiſtrators of the party "dying; but the plaintiff, or if he be "dead after ſuch interlocutory judgment, his executors or adminiſtrators, "ſhall and may have a *ſcire facias* "againſt the defendant, if living after "ſuch interlocutory judgment, or if he "died after, then againſt his executors "or adminiſtrators, to ſhew cauſe why "damages in ſuch action ſhould not be "aſſeſſed and recovered by him or "them; and if ſuch defendant, his "executors or adminiſtrators, ſhall appear at the return of ſuch writ, and "not ſhew or allege any matter ſufficient "to arreſt the final judgment, or being

"re-

"returned warned, or upon two writs "of *ſcire facias*, it be returned, that the "defendant, his executors or adminiſtrators, had nothing whereby to be "ſummoned, or could not be found in "the county, ſhall make default, that "thereupon a writ of inquiry of damages ſhall be awarded, which being "executed and returned, judgment final "ſhall be given for the plaintiff, his "executors or adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias*, "againſt ſuch defendant, his executors "or adminiſtrators, reſpectively." See the form of the *ſcire facias*, where one of the parties dies after interlocutory judgment, and before the iſſuing of a writ of inquiry. Tidd's *Prac. Forms*, 441; and where the death happens after the iſſuing, and before the execution of the inquiry, Clift. 680. Lill. Ent. 647. 1 Rich. Prac. C. P. 386. 5th edit. Tidd's *Prac. Forms*, 442. Imp. C. P. 528. 4th edit. and where the death happens after the execution, and before the return of the inquiry, Imp. C. P. 527. 4th edit. Tidd's *Prac. Forms*, 444.; and for the form of final judgment thereon, ſee Tidd's *Prac. Forms*, 461. If the party dies before interlocutory judgment, it is a caſe not within the ſtatute; and therefore it will be irregular to ſign interlocutory judgment after, and proceed upon the ſtatute. 1 Wilſ. 315. *Wallop* v. *Irwin*.

Where the death of either party happens after interlocutory judgment, and before the execution of the writ of inquiry, the form of the *ſcire facias* ought to be for the defendant, or his executors, or adminiſtrators, to ſhew cauſe why the damages ſhould not be *aſſeſſed* and recovered againſt them. 1 Salk. 315. *Smith* v. *Harmon*. Lill. Ent. 647. 1 Rich. Prac. C. P. 386. Tidd's *Prac. Forms*, 444. Imp. C. P. 528. Imp. K. B. 391. 4th edit. though the form in Clift. 680. is to ſhew cauſe why the plaintiff ſhould not *recover* his damages, &c. and to hear the judgment of the court thereupon 6 Mod 144. *Smith* v. *Harmon*. And where the party dies after the execution of the writ of inquiry, but before the return of it, the *ſcire facias* muſt be to ſhew cauſe why the damages aſſeſſed by the jury ſhould not be *adjudged* to the plaintiff, or his executors or adminiſtrators. 1 Wilſ. 243. *Goldſworthy* v. *Southcott*. ſee *ante*, 6. note (2.) and 1 Term. Rep. 388. *Wright* v. *Nutt*.

The final judgment upon the writ of inquiry, after interlocutory judgment revived by *ſcire facias* under the ſtatute 8 and 9 W. 3., muſt be againſt the *executor or adminiſtrator*, and not againſt the *teſtator or inteſtate* himſelf, as it is upon the ſtatute 17 Car. 2.; and therefore it cannot be pleaded as a judgment againſt the teſtator or inteſtate. 1 Salk. 42. *Weſton* v *James*. And where the defendant dies after interlocutory and before final judgment, the plaintiff muſt ſue out two writs of *ſcire facias* to entitle himſelf to take out execution; one before final judgment to make the executors or adminiſtrators parties to the record; the other after final judgment, to give them the opportunity of pleading the want of aſſets, or any other matter, that an executor may plead in his defence to a *ſcire facias* brought upon a final judgment obtained againſt his teſtator; for it would be unreaſonable that the executors or adminiſtrators ſhould be in a worſe ſituation, where their teſtator or inteſtate died before final judgment, than they would have been in, if he

he had died after. Say. Rep. 265. *Tomlins* v *Gratton*.

We have already obſerved, *ante*, 6. note (1.) that if either plaintiff or defendant die after final judgment and before execution, a *ſcire facias* muſt be ſued out by or againſt his executors or adminiſtrators, or, if the defendant die, againſt his heir and terre tenants. If any of the executors are feme coverts, their huſbands muſt be made parties to the *ſcire facias*. And though an executor or adminiſtrator become bankrupt, he may ſtill proceed by *ſcire facias*, as the bankruptcy does not affect his repreſentative character. A *ſcire facias* may be ſued out either by or againſt the executor of an executor who has proved the will, for he is executor of the firſt teſtator; but an adminiſtrator of the executor does not repreſent the teſtator; nor does the executor or adminiſtrator of an adminiſtrator repreſent the firſt inteſtate. Therefore a *ſcire facias* cannot be ſued out by or againſt either of them to revive the judgment, 5 Rep. 9. b. but in that caſe there muſt be taken out adminiſtration *de bonis non*, as it is called, that is, of ſuch goods as are left unadminiſtered by the executor or adminiſtrator.

If a judgment be recovered againſt an executor who dies inteſtate, a *ſcire facias* will lie upon the judgment *againſt* the adminiſtrator *de bonis non* of the teſtator, for he comes in the place of the teſtator, and being for a debt of the teſtator, is liable; but an adminiſtrator *de bonis non* could not have a *ſcire facias* upon a judgment obtained *by* the executor of the teſtator, but was put to his action; for he comes paramount the judgment, and is no party thereto. Cro. Car. 167. *Snape* v. *Norgate*. S. C. 1 Roll. Abr. 890. (T.) pl. 3. Sir *W. Jones*, 214. But now by ſtatute 17 Car. 2. c. 8. ſ. 2. "Where any judgment after a verdict ſhall be had, by or in the name of any executor or adminiſtrator, in ſuch caſe an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment." In the conſtruction of this ſtatute it has been holden, that ſince an adminiſtrator *de bonis non* may by virtue of the act commence an execution (that is, by *ſcire facias*) on a judgment obtained by an executor or adminiſtrator, it is within the equity of the act, that he may perfect an execution already begun by the executor or adminiſtrator, for the right now comes to him. 1 Salk. 323. *Clerk* v. *Withers*. But ſtill, if an executor brings a *ſcire facias* on a judgment, or recognizance, and has judgment *quod habeat executionem*, and dies inteſtate, the *adminiſtrator de bonis non* muſt bring a *ſcire facias* upon the original judgment, and cannot proceed upon the judgment in the *ſcire facias*. 2 Ld. Raym. 1049. *Trevelan* v. *Lawrence*. See the form of a *ſcire facias* for or againſt an executor or adminiſtrator to revive a judgment obtained by or againſt the teſtator or inteſtate. Co. Ent. 617. a. 618. b. Lill. Ent. 638, 639, 640. 645. 659. Theſ. Brev. 228. 240. 241. 250. 252. 1 Rich. Prac. C. P. 378, 379, 380. 2 Rich. Prac. C. P. 400. Imp. C. P. 517, 518. 4th edit. Imp. K. B. 385, 386. 4th edit. Tidd's *Prac. Forms*, 447, 448, 449.

Where a judgment is had againſt one who dies before execution, it is ſaid that a *ſcire facias* will not lie againſt his heir and terre-tenants, until a *nihil* is returned to a *ſcire facias* againſt his perſonal re-

repreſentatives. Carth. 107. *Panton* v. *Hall*; but when *nihil* is returned, the plaintiff may have a *ſcire facias* againſt the heir of the defendant, either alone, or jointly with the tenants of the lands, whereof the defendant was ſeiſed at the time of the judgment, or at any time after. See *ante*, p. 7. note (4.) p. 8. notes (8, 9.)

In a *ſcire facias* againſt the terre-tenants, if the heir and others are returned terre-tenants, the defendants cannot object that a *ſcire facias* ſhould firſt iſſue againſt the heir, before the writ ſhould iſſue againſt them as terre tenants. Cro. Eliz. 896. Sir C. *Heydon*'s caſe. S. C. Co. Ent. 619. But it ſeems to be the better opinion, that the terre-tenants alone are not to be charged, until the heir be ſummoned, or that it be returned that there is no heir, or that the heir has not any lands to be charged; for the heir may have a releaſe to plead, or other matter to bar the execution. Bac. Abr. *Scire facias*. 418. ſee *ante*, p. 8. note (3).

Where there are ſeveral defendants, and one of them dies before execution, ſince the charge upon the judgment ſurvives as to the perſonalty, though not to the realty, as we have already ſhewn, the plaintiff may have a *ſcire facias* framed upon the ſpecial matter, namely, againſt the ſurvivor, to ſhew cauſe why the plaintiff ſhould not have execution againſt him of his goods and chattels, and of the moiety of his lands, and againſt the heir and terre-tenants of the deceaſed, to ſhew why the plaintiff ſhould not have execution of a moiety of the lands of the deceaſed without mentioning any goods. Carth. 107. *Panton* v. *Hall. per Holt*, C. J.

There is another writ of *ſcire facias* againſt the terre-tenants upon a writ of error to reverſe a fine or recovery; but this writ is ſaid by Lord *Holt* to be diſcretionary, and not *ſtricti juris*, but yet to have been the conſtant and uſual courſe of the court, and therefore not to be departed from. See the form of the award of it, *poſt*, 92, 93. in the caſe of a recovery, and Co. Ent. 273. b. in the caſe of a fine. And the terre-tenants can only plead a releaſe of errors, to defend their own poſſeſſion, or for the ſake of purchaſers; but they cannot plead in abatement of the writ, becauſe they are not parties to the ſuit. Carth. 111. *The Earl of Pembroke*'s caſe S. C. Skin 273. S. P. 1 Burr. 359, 360. *Hal.* v *Woodcock*. And there is no neceſſity in ſuch caſe for a *ſcire facias* againſt the heir. 1 Burr. 412 *Sheepſhanks* v. *Lucas*.

4. With reſpect to a *ſcire facias* to repeal letters patent. If the king by his letters patent grants the ſame thing to two perſons, the *firſt* patentee may have a *ſcire facias* to repeal the ſecond patent. 4 Inſt. 88. Dy 197. b. 298. a. 2 Roll. Abr. 191. (U.) pl. 2 but the ſecond patentee cannot bring a *ſcire facias*, though the better right ſhould be in him. Dy. 276. b. 27. a. So if the king's grant be founded upon a fraud or a falſe ſuggeſtion, he may have a *ſcire facias* to repeal it. 4 Inſt. 88. Bro. *Patent*, 14. *Petition*, 11. 11 Rep. 71. b. *Magdalen College* caſe. 2 Roll. Abr. 191. (T.) As if the patent recites another to have an office, who had in truth forfeited it, and grants it when it ſhall happen to be vacant after the death, ſurrender, &c. of that other. Dy. 197. b. but no *ſcire facias* can be ſued out in this caſe until the king's attorney general grants his fiat to take it out. So if the king grants any thing which by law he cannot grant, he, *jure regio*, for the advancement of juſtice and right, may have a *ſcire facias* to repeal his own letters

ters patent. 4 Inſt. 88 But if the patent be void in itſelf, it is ſaid, that *non conceſſit* may be pleaded to it, without a *ſcire facias* to repeal it. 2 Roll. Abr. 91. (S) pl. 2. So if an officer makes a forfeiture of his office, the king may have a *ſcire facias* to repeal his patent. Dy. 197. b. 198. a. 210. 211.

Where a patent is granted to the prejudice of another, he may have a *ſcire facias* to repeal it at the king's ſuit; as if a market, fair, &c. be granted to the annoyance and prejudice of an ancient market or fair of another Dy 276. b. 3 Lev. 220 *Rex* v. *Sir Oliver Butler*. S. C. 2 Vent 344. And in this caſe the king of right is to permit the perſon prejudiced by the patent, upon his petition, to uſe his name for the repeal of it, in a *ſcire facias* at the king's ſuit, to prevent multiplicity of actions upon the caſe, which will lie notwithſtanding ſuch void patent 2 Vent. 344. And indeed it has been holden that the perſon prejudiced by the patent may, upon the inrolment of it in chancery, have a *ſcire facias* to repeal it as well as the king. 6 Mod 229 *Brewer* v *Weld*.

A *ſcire facias* for repealing a patent may be ſued in the petty bag in Chancery, for it is a record there. 4 Inſt. 88. 3 Lev. 223. So it may be in the king's bench 4 Inſt. 72. If the writ alleges matter by the words "whereas "we are given to underſtand and be "informed" it is well enough, for they are ſufficient to put the party to anſwer. 3 Lev. ....

A *ſcire facias* by the king to repeal a patent upon a forfeiture of office, ought to ſet forth the cauſe of forfeiture. Dy. 198. b., but it is not neceſſary to do ſo in a *ſcire facias* by a former patentee. Ibid.

Judgment on a *ſcire facias* to repeal a patent may be by confeſſion; or, by default, if the defendant be returned warned, or upon two *nihils*. Dy. 197. b. 198. a. 2 Roll. Abr. 192. (X.) pl. 1. So the defendant may demur to a *ſcire facias* if the matter alleged be not ſufficient to repeal the patent. 3 Lev 221. *Rex* v. *Sir Oliver Butler*. And if on a *ſcire facias* to repeal a market it be found, that the *grant* was to the prejudice of another, it is ſufficient, though it is not found that the *uſer* was prejudicial. 1 Str. 43. *Rex* v. *Eyre*. The judgment in a *ſcire facias* for repealing a patent is "that the ſaid "letters patent of our ſaid lord the king "be revoked, cancelled, vacated, annulled, void and invalid, and be altogether had and held for nothing, and alſo "that the inrolment thereof be cancelled, "quaſhed and annulled 4 Inſt. 88. Dy. "197. b; ſee the form of a *ſcire facias* "to repeal a patent. Lill. Ent. 411. See "the form of the memorial to his Majeſty for a *ſcire facias*, and his Majeſty's warrant to the attorney-general "to ſue it out, the attorney-general's "*fiat*, and the writ of *ſcire facias* thereon." 2 Rich. Prac. C. P. 391—398.

A *ſcire facias* to revive a judgment by or againſt the parties, or their perſonal repreſentatives, muſt be brought in the county where the original action was laid. Hob. 4. *Muſgrave* v. *Wharton*. S. C. Cro. Jac. 331. and ſee Yelv. 218. S. C. But upon a return of *nihil* againſt the perſonal repreſentatives, the plaintiff may have a *teſtatum ſcire facias* againſt the heir and terre-tenants in another county. Cro. Car. 313. *Eyres* v. *Taun-*

v. *Taunton.* Carth. 105. *Panton* v. *Hall.*

It is ſaid that a *ſcire facias* is not amendable; as where in a *ſcire facias* on a judgment, the plaintiff's name was by miſtake put for the defendant's, namely *Ralph* inſtead of *James*; and it was moved that it ſhould be amended, it being the fault of the clerk; but the motion was denied, for the writ does not appear to be wrong, and there may be ſuch a judgment. 1 Salk. 52. *Vavaſor* v. *Baile.* However, both Lord *Holt* and Lord *Treby* were of opinion, that the fault of the clerk, ſuch as *John* for *Thomas*, was amendable. 1 Ld. Raym. 183. 548. *Villers* v. *Parry.* And in *Brewſter* v. *Wills*, cited 2 Ld. Raym. 160. a *ſcire facias* out of the petty bag returnable into K. B. was amended, and *Sping* a man's name was amended into *Spring* by the inſtructions given to the clerk of the petty bag. So where a *ſcire facias* recited a judgment of the 3d year of Queen *Anne* inſtead of the *firſt* year, it was amended and made the *firſt* agreeable to the record. 2 Ld. Raym. 1010. but in both theſe caſes the amendment was made immediately upon the return of the *ſcire facias*, before any plea pleaded. Ibid. But if there be a variance in the *ſcire facias* from the judgment, and the defendant has pleaded *nul tiel* record, the writ it ſeems is not amendable. 2 Ld. Raym. 1057. *Buckſome* v. *Hoſkin.* S. C. 6 Mod. 263. 310. 1 Salk. 52. S. P. 2 Str. 892. *Baynes* v. *Forreſt.* 1165. *Grey* v. *Jefferſon.* So if it be defective in the *return* or *teſte*, it is not amendable. 1 Str. 401. *Hillier* v. *Froſt.* And in Barnes 26, 27. *Hodgſon* v. *Michell*, it is ſaid, that the court in ſome inſtances refuſes leave to amends writs of *ſcire facias againſt bail*, when by the amendment, the bail may be deprived of the advantage of ſurrendering the principal, as perhaps they might do, in caſe of a faulty *ſcire facias* quaſhed, and a new one ſued out.

Where the ſheriff returns *ſcire feci*, generally ſpeaking the defendant has been previouſly ſerved with a copy of the ſheriff's warrant, which recites the writ of *ſcire facias*: or at leaſt, ſome notice of the proceedings muſt have been given him, the ſufficiency of which, if diſputed, muſt be determined by the court on the circumſtances. 2 Black. Rep. 837. *Wright* v. *Page.* And in general, where the ſheriff returns *ſcire feci*, the court will not inquire into the validity of the ſummons on motion, but leave the party to his action againſt the ſheriff for a falſe return. 2 Str. 813. *Barr* v. *Satchwell.* 3 Burr. 1360, 1361. *Hunt* v. *Coxe* S. C. 1 Black. Rep. 393.

The ſheriff, on the return of the *ſcire facias*, either returns *ſcire feci*, or *nihil*, that is, that he has given notice to the defendant, or that he has nothing by which he can make known to him; ſee the form of the return, Theſ. Brev. 227 263. 228. 273, Tidd's *Prac. Forms*, 455. But to a *ſcire facias* againſt the heir and terre-tenants, the ſheriff returns, either that there are none, or that he has warned them to appear; in the latter caſe, if the writ be general againſt the terre-tenants without naming them, the ſheriff ſhould return that he has warned certain perſons, deſcribing them, being tenants of *all* the lands in his bailiwick, or certain perſons tenants of certain lands, and that there are no others. See the form, Co. Ent. 622. a. Herne 327. Dalt. Sher. 559. Theſ Brev. 269, 96. 279. 288. Litt. Ent. 385, 386.

Carth. 105. *Panton* v. *Hall.* 2 Salk. 598. S. C.; ſee the return of *nihil* againſt an heir and terre-tenants, or againſt them ſeverally. Theſ Brev. 253. 271. 283. Lill. Ent 385. Tidd's *Prac. Forms*, 457. and of *nihil* as to the heir, and *ſcire feci* to the terre-tenants of one defendant, and *nihil* as to the heir and terre-tenants of another, Tidd's *Prac. Forms*, 457.

Where the ſheriff returns *nihil*, the plaintiff muſt ſue out a ſecond or *alias* writ of *ſcire facias*, commanding the ſheriff as *before* he was commanded &c. 4 Inſt. 472. 10 Jac. 59. *Randal* v. *Wale* And if the ſheriff alſo return *nihil* to the ſecond writ, and the bail or defendants do not appear, there ſhall be judgment againſt them. Dy. 168. a two *nihils* being deemed equivalent to a *ſcire feci*. Dy. 172. a. Yelv 113. *Bromley* v. *Littleton*. Sty. Rep 281 288 323. *Barſo.k* v. *Tompſon*. For in the king's bench in all caſes there muſt be either one *ſcire facias* with a *ſcire feci* returned or two writs of *ſcire facias* with *nihil* returned. 8 Mod. 227. *Andrews* v. *Harper*. And ſo it is in the common pleas in all caſes, except where the *ſcire facias* is to revive a judgment againſt the defendant himſelf, who was party or privy to the judgment, for there one *ſcire facias* with a *nihil* is ſufficient. Dy 168 a., and there muſt be 15 days between the teſte and return of ſuch *ſcire facias* which makes it equivalent to two. Formerly both writs of *ſcire facias* were ſued out together, by making the *teſte* of the ſecond, as if the firſt had been actually returned; but the court of K. B. made a rule, that both ſhall not be ſued out together, but the firſt muſt be duly returned before the *alias ſcire facias* can be ſued out. 2 Salk. 599. *Anon.* 8 Mod. 227, 228. *Andrews* v. *Harper*. And indeed, although the intent of the *ſcire facias* is to give notice to the party, yet by the general practice, the intent is wholly defeated; for the defendant may be ſummoned or not, as the plaintiff thinks fit, and if he takes out two writs of *ſcire facias* with *nihil* returned to each, the defendant never has any notice.

The defendant either appears, or makes default; in the latter caſe, the plaintiff is entitled to judgment See Com. Dig. *Pleader*, (3 L 8, 9) And where a man recovers judgment for damages againſt two, and ſues out a *ſcire facias* againſt them to have execution, if it be returned that one was ſummoned, and he makes default, and that the other has nothing, the plaintiff may have execution againſt him, who was ſummoned and made default, for the whole 1 Roll. Abr. 892. (S) pl 1. So if it be returned that one of them is dead, and that the other was ſummoned, and he makes default, the plaintiff ſhall have execution for the whole againſt the ſurvivor. Ibid pl. 2. When judgment is ſigned, the proceedings in *ſcire facias* muſt be entered on a roll, and execution awarded See the form of the entry of the proceedings againſt bail, where there is judgment by default upon a *ſcire feci* returned Imp. K. B. 402. 4th edit. Imp. C. B. 542, 543. 4th edit. Tidd's *Prac. Forms*, 404. and where there is judgment againſt them by default on two *nihils*. Lill. Ent. 403 480. 1 Rich. Prac. C. P 392. 5th edit Imp. K. B. 401, 402. Imp. C. B. 545. Tidd's *Prac. Forms*, 404, 405 And where the writs of *ſcire facias* are of different terms. Imp. C. B 546. See the form of the entry of the proceedings in other caſes, where there is judg

ment by default upon a *ſcire feci* returned. Lill. Ent. 388, 389. Theſ. Brev 95, 96. Hans. 127. 133. Imp. K. B. 388. Tidd's *Prac. Forms*, 459, and where there is judgment by default on two *nihils*. Cliſt 682. Imp. K. B. 387. Tidd's *Prac. Forms*, 460, 461.

If the bail or defendants *appear* to the *ſcire facias*, the plaintiff muſt declare againſt them. See the form of the declaration in *ſcire facias* againſt bail. Tidd's *Prac Forms*, 467. 463. &c. Imp. K. B 402. Imp C. P. 546. againſt the heir and terre-tenants. Tidd's *Prac. Forms*, 465. Imp. K B. 388. Imp C. P. 528 A declaration in *ſcire facias* returnable the laſt return of a term, may be entitled of the ſame term generally, for the court conſiders the whole term as one day. 3 Wilſ. 154. *Ward* v. *Ganſell.*

And in a declaration by executors or adminiſtrators it is uſual to make a profert of the letters teſtamentary, or of adminiſtration. See *ante*, 9. *Jeffreſon* v. *Morton*, note (12).

A man may plead in bar, or in abatement, to a *ſcire facias*, as well as to other actions. 10 Mod. 112. *Allice* v. *Gale*. 2 Inſt. 470.

As to pleas in abatement, ſee *ante*, p. 8. note (10.) p. 12. note (19.) To a *ſcire facias* againſt bail in the action, they may plead *nul tiel record* of the recognizance. Lib. Plac. 285. Theſ. Brev. 295, or of the judgment againſt the principal. So the bail may plead a ſatisfaction by, or a releaſe of the judgment to, the principal or bail. Com. Dig. *Bail*, (R. 6.) 1 Roll. Abr. 336. pl. 3. or payment ſince the ſtatute 4 Anu. c. 16. ſ. 12. Lib. Plac. 282. But the bail cannot plead the bankruptcy and certificate of the principal in bar either to an action of debt, or to a *ſcire facias*, on the recognizance. 2 Boſ. & Pull. 45. *Donnelly* v. *Dunn*. So the bail may plead that the principal rendered himſelf, or was rendered by the bail, before the return of the *capias ad ſatisfaciendum*. 1 Ld. Raym. 156, 157. *Wilmore* v *Clerk*. Sir *W. Jones*, 139, *Calfe* v *Dingley*, or that the principal died before the return of the *capias ad ſatisfaciendum*. 1 Roll. Abr. 336. pl. 2. Hutt. 47. *Suggs* v. *Sparrow*. Sir *W. Jones*. 29. S. C. 139. *Calfe* v. *Dingley*. Sty. Rep. 324. *Barcock* v. *Tompſon*. Lib. Plac. 280. And the defendant ought to ſhew in his plea when the principal died. Cro. Jac. 97. *Williams* v. *Vaughan*. And the plaintiff in his replication muſt ſtate a particular *capias ad ſatisfaciendum* ſued out againſt the principal, and that he was alive at the return of that *capias ad ſatisfaciendum*, and conclude with a verification. Carth. 4. *Fortune* v. *Davis*. 2 Wilſ. 65. *Filewood* v. *Popplewell*. Doug. 58. *Chandler* v. *Roberts*. 2 Term Rep. 576. *Henderſon* v. *Withy*. The bail may alſo plead in diſcharge of their liability that no *capias ad ſatisfaciendum* iſſued againſt the principal. Sty. Rep. 281. 324. *Barcock* v. *Tompſon*. 2 Lutw. 1285. *Redman* v. *Idle*. Lib. Plac. 212. pl. 6. And a void writ is as none, as if it be teſted before the judgment was had. 3 Keb. 671. *Vere* v. *Holyoke*. See 1 H. Black. 74. *Cawler* v. *Jolley*. But if there be only an irregularity in ſuing out the writ, as if it be ſued out after a year without a *ſcire facias*. 2 Ld. Raym. 1095. *Cholmondely* v. *Bealing*. S. C. 6 Mod. 304, or made returnable on a day out of term. 2 Burr. 1187. *Campbell* v. *Cumming*, the bail cannot take advantage of the irregularity by pleading.

But it is not a good plea, that the principal died before the iſſuing of the

capias

capias ad ſatisfaciendum; for though it is concluſive, if found for defendant, it is not ſo, if found for the plaintiff; becauſe the principal may ſtill have died after the iſſuing, and before the return of the writ. 10 Mod. 267. 303. *Weddal* v. *Jocar*; but the proper plea is that the principal died before the return of the *capias ad ſatisfaciendum*. Lib. Plac 280. Neither is it a good plea, that the principal died *after* the return of the writ of *capias ad ſatisfaciendum*; the recognizance being in ſtrictneſs forfeited upon the return of *non eſt inventus*; for though a render afterwards on the return, or appearance day, of the ſecond *ſcire facias*, where two *nihils* are returned, or of the firſt *ſcire facias* where *ſcire feci* is returned, *ſedente curiâ* is allowed yet that is merely *ex gratia*, and not *ex debito juſtitiæ*, and therefore cannot *be pleaded*, Sty. Rep. 324. *Barcock* v. *Tompſon*. Com. Dig. *Bail*, (Q 2,) Barnes, 106, 107. *Whitehead* v. *Gale*. 8 Mod. 340. Anon. 1 Wilſ. 270. *Simmonds* v. *Middleton*. 2 H. Black 593. *Lardner* v. *Boſſuge*. And if the principal die after the return of the *capias ad ſatisfaciendum*, and before the return is filed, the bail are fixed, and the court will not ſtay the filing of the return. 6 Term Rep. 284. *Rawlinſon* v. *Gunſton*.

To a *ſcire facias* on a judgment, the defendant may plead *nul tiel record*. Com. Dig. *Pleader*, (5, L. 15.) or payment ſince the ſtatute 4 Ann. c. 16. ſ. 12. or a releaſe, or that the debt and damages were levied on a *fieri facias*. Clift. 675. 4 Leon. 194. *Mountney* v. *Andrews*; or that his lands were extended for them upon an *elegit*. Dy. 299. b. 1 Lev. 92. *Glaſcock* v. *Morgan*, or his perſon taken in execution on a *capias ad ſatisfaciendum*. 1 Salk. 271. *Scott* v. *Peacock*.

It ſeems ſettled, that the defendant cannot plead any matter to the *ſcire facias* on a judgment, which he might have pleaded to the original action. Cro. Eliz. 283. *Allens* v *Andrews* 88. *Middleton* v. *Hill* 1 Sid. 182. *Kowe* v. *Bellaſeyr*. 1 Salk 2. *Weſt* v. *Sutton*, S C. 2 Ld. Raym 854. 2 Str 1044. *Buſh* v. *Gower*. S. C. Caſes temp Hardw. 233. Cowp. 727, 728. *Cook* v. *Jones*. It is ſaid that if an executor pleads *plene adminiſtravit* to a *ſcire facias* brought againſt him upon a judgment againſt his teſtator, it is bad on a ſpecial, though good, on a general, demurrer; but the executor ought to plead, that he had nothing in his hands at the time of the death of his teſtator, or that no goods came to his hands except ſo much, if any did, and ſhew how he adminiſtered them. Moor, 858. *Harecourt* v. *Wrenham*. Cro. Eliz. 575. *Ordway* v. *Godfrey*. All. 47, 48. *Petchet* v. *Woolſton*. Co. Ent. 617. 1 Salk. 296. *Newton* v. *Richards*. S. C. Comb. 298. Skin. 565. 4 Mod. 296. But this ſeems queſtionable, and indeed Lord Holt ſaid, in the above caſe of *Newton* v. *Richards*, that precedents prevailed with him more than the reaſon of the thing. Comb. 298. and the plea is pleaded, Poſt, 220, and no objection is made to it. Where interlocutory judgment was obtained againſt the defendant's teſtator, and the plaintiff died inteſtate before final judgment, and his adminiſtrator ſued out a *ſcire facias* on the 8 and 9 Will. 3, againſt the defendant's executor, it was held that the defendant the executor could not plead a judgment obtained againſt him on a bond due from his teſtator, and no aſſets *ultra*, &c.; for the ſtatute did not intend that the executor ſhould be in a better ſituation, as to the aſſeſſing of damages upon the inquiry, than his teſtator, who could have pleaded nothing but a releaſe, or other matter in bar ariſing

ariſing *puis darrein continuance*. 1 Salk. 315. *Smith* v. *Harmon* S. C 6 Mod. 142. There ſeems to be a miſtake in the report in ſtating that the inteſtate ſued the defendant *as executor*, and obtained interlocutory judgment againſt him. From the reaſons on which the deciſion appears to be founded, the fact ſeems to have been that the inteſtate obtained interlocutory judgment againſt the *teſtator*, and a *ſcire facias* was ſued out againſt his *executor*.

If a *ſcire facias* be ſued out on a judgment, and the ſheriff return two *nihils*, and execution awarded, and the defendant has a releaſe or acquittance or other matter, which he might have pleaded to the *ſcire facias*, he may relieve himſelf by *auditâ querelâ*, though not by writ of error; but if the ſheriff return *ſcire feci*, the defendant is eſtopped for ever, and cannot by any means take advantage of that matter, becauſe he might have pleaded it upon the return of the *ſcire facias*. F. N. B. 237. 7. edit. 1 Salk. 93. Anon. 1 Will. 98. *Cooke* v. *Berry*. Sty. Rep. 281. 288. 323. *Barcock* v. *Tompſon*. 1 Salk. 262. *Lampton* v *Collingwood*. S. C. 4 Mod. 314. 1 Str 197. *Wraight* v *Kitchingman*. 1 Salk. 264. *Wicket* v. *Creamer*. And where the caſe is clear, 2 Ld. Raym. 1295. *Ludlow* v. *Lennard*; or the application recent, Barnes, 277. *Whitehead* v. *Gale*; the court will relieve the party upon motion, without putting him to an *auditâ querelâ*. 1 Salk. 93. *Anon.*, but they will never interfere in a ſummary way, where the fact is diſputed. 2 Str. 1198. *Mitford* v. *Cordwell*: or there has been a long acquieſcence and ſeveral ſteps have been taken ſubſequent to the award of execution. 2 Str. 1075. *Wharton* v. *Richardſon*; or the ground of relief be ſuch matter of fact as may be proper to be tried. 1 Salk 264. *Wicket* v. *Creamer*.

No *damages* for delay of execution can be given in a *ſcire facias*, nor could *coſts*, until the ſtatute 8 & 9 W. 3. c. 11. ſ. 3 which enacts "that in all ſuits "upon any writ or writs of *ſcire facias*, "the plaintiff obtaining an award of "execution after plea pleaded or de-"murrer joined thereon, ſhall recover "his coſts of ſuit; and if the plaintiff "become nonſuit, or ſuffer a diſcon-"tinuance or a verdict ſhall paſs againſt "him, the defendant ſhall recover his "coſts, and have execution for the ſame "by *capias ad ſatisfaciendum*, *fieri facias* "or *elegit*." The fifth ſection provides, "that the ſtatute ſhall not extend to "executors or adminiſtrators." If there ſhould be a judgment for coſts in a *ſcire facias* againſt an executor, the judgment is only erroneous in that part, and therefore may be reverſed as to coſts, and affirmed as to the reſidue. 1 Str. 188. *Bellew* v. *Aylmer*. It is holden, that this ſtatute does not extend to a *ſcire facias* proſecuted in the name of the king to repeal a patent. 7 Term Rep. 367. And it has been adjudged, that no coſts are payable by the plaintiff on motion to quaſh his own writ before plea. Tidd's Prac. 1076, 1077. or after a plea in abatement. 1 Str. 638. *Pocklington* v. *Peck*.

(5) This objection ſeems to be well founded. It is holden, that if tenant by *elegit* or ſtatute has levied part of the debt under the extent, the conuſor or defendant upon tender of the reſidue *in court*, ſhall have a *ſcire facias ad rehabendam terram*, for it appears on record how much was due at firſt, how much was paid, and what remains due. But

But if the conuſor or defendant tenders the money, *but not in court*, and the tenant by *elegit*, or ſtatute refuſes, he ſhall not have a *ſcire facias*. 2 Roll. Abr. 482. (J.) pl. 2, 3. 483 (K) pl. 10, 11. 484. (L.) pl. 2. 485. (N) pl. 8. That it is neceſſary to bring the money into court, appears from the following authorities. Bro. *Scire Facias*, 43. 93. Bac. Abr. *Execution*, 347. *Scire Facias*, 415. and in Raſt. 236. a. a profert of the money into court is ſtated, after the ſheriff's return to the *ſcire facias*, agreeable to what is above contended for by the reporter.

(6) This is a *ſcire facias ad rehabendam terram*, and lies for avoiding executions upon judgments, recogniſances, or ſtatutes, and differs from the writ of *auditâ querelâ*, for that avoids an execution unjuſtly obtained at firſt; but the *ſcire facias* admits, that the execution was juſt at firſt, but inſiſts that, inaſmuch as the end for which it was granted is obtained, it ought of conſequence to ceaſe. Bac. Abr. *Scire Facias*, 414.

The words "*quouſque debitum fuerit* "*levatum*" in the ſtatute of *Weſtminſter* 2. c. 18. which gives the *elegit*, and "*quouſque debitum fuerit ſatisfactum*," in the 13 Edw. 1. and 27 Edw. 3 which give the ſtatutes merchant, and ſtaple, are conſtrued to mean that the plaintiff or conuſee ſhall hold the land not ſimply until *he be*, but until *he may be* ſatisfied without his wilful default. Therefore it is holden, that if tenant by *elegit*, or ſtatute, neglect to take the profits, the defendant or conuſor, at the time when the debt might have been ſatisfied thereout, may ſue out a *ſcire facias* to have his land again, though he cannot in ſuch caſe enter, that is, bring an ejectment. 4 Rep. 84. a. Sir *Andrew Corbet*'s caſe. Dalt. Sher. 125. In ſome caſes the conuſor or defendant may have a *ſcire facias* to have his land again, before the tenant by *elegit*, or ſtatute can have been ſatisfied for the debt out of the extended value of the land. As where the defendant or conuſor bring the whole or reſidue of the money into court, or has a releaſe from the plaintiff or conuſee, or has paid him the money, and has his acquittance; and may alſo have a *ſcire facias* to account, as well as to have his land again, where the tenant by *elegit*, or ſtatute has been ſatisfied by ſome caſual profit. Bro. *Scire facias*, 32. 15 H. 7. 15. a. 2 Inſt 396. 2 Roll. Abr. 479 (D.) pl. 2. 480. pl. 6. 483. (K.) pl. 11. 14. Hard 82. Bro. *Scire Facias*, 90. 50 Edw. 3. 16. 21 Edw. 3. 1. a. 2 Vent 238. *Marſh* v. *Lee*. 2 Roll. Abr. 486. (P.) pl. 2. Dalt. Sher. 136. but the defendant or conuſor cannot enter, becauſe the poſſeſſion of the plaintiff or conuſee being founded upon matter of record, is not to be taken away by entry before he has an opportunity of anſwering in a court of record. 2 Roll Abr 479. (D.) pl. 2.

In caſe of an *elegit* upon a judgment, or recognizance at common law, when the tenant by *elegit* has received payment of his debt out of the uſual and ordinary profits of the land, the defendant or conuſor may enter, that is, bring an ejectment without ſuing out a *ſcire facias*, becauſe tenant by *elegit* is only to retain the land until his debt be levied, and as that is a ſum certain, it may be aſcertained when the plaintiff was, or might have been, ſatisfied out of the extended value of the land: but when land is extended on a ſtatute merchant, ſtatute-ſtaple, or recognizance in the nature of a ſtatute-ſtaple, the conuſor cannot enter though the conuſee has received the whole

debt, damages and coſts, but muſt ſue out a *ſcire facias ad computendum et rehabendum terram*; for by the acts of parliament which give thoſe ſecurities, the conuſee is entitled to retain the land until he be ſatisfied for his debt, coſts and damages, together with his reaſonable labours and expences, and as thoſe are *uncertain*, and the conuſee is in by matter of record, the conuſor muſt as we have already obſerved, ſue out a *ſcire facias* againſt the conuſee, before he can have his land reſtored. Bro. *Scire Facias*. 87. 2 Inſt. 236. 239. 4. Rep. 67. a. b. *Fulwood's* caſe. 2 Roll. Abr. 479. (D.) pl. 3. 480. pl. 4. 482. (I.) pl. 1. 486. (P.) pl. 1. Dalt. *Sher.* 136. Hard. 82. Cro. Car. 598. *Burwell* v. *Harwell*. 2 Vent. 336. *Dighton* v. *Greenvill*. Bac. Abr. *Scire Facias*. 414, 415. *Execution*, 336, 337.

The court, in the caſe of a *ſcire facias* for an account and to have the land back again, takes the account according to the extended value, which the ſheriff always fixes much below the real value. But if the conuſor or defendant goes into a court of equity, the conuſee or plaintiff muſt account for the profits he has received above the extended value; but that is only done upon the terms of the defendant or conuſor paying intereſt on the judgment, and ſuch extra coſts and damages as the plaintiff was neceſſarily put to by the defendant. 2 Vent. 338. *Marſh* v. *Lee*. 2 Vezey, 589, 592. *Earl of Bath* v. *Earl of Bradford*. Hard. 136.

If the conuſee or plaintiff be wrongfully ouſted by the conuſor or defendant, or any perſon claiming under the conuſor or defendant for life or years, the conuſee or plaintiff ſhall hold over. Co. Litt. 289. b. 4 Rep. 66. b. *Fulwood's* caſe. Dalt. *Sher.* 135. 1 Leon 272. Lord Stafford's caſe. So if the wife of the conuſor or defendant recover dower, the conuſee or plaintiff ſhall hold over, for ſhe claims by her huſband. Ibid. If the conuſee or plaintiff be interrupted from taking the profits of the land by reaſon of wars, that is, if the land or profits be deſtroyed by war, he ſhall not hold over, but it will be to his own diſadvantage. Fitz. *Execution*, 246. 4 Rep. 82. b. Sir *Andrew Corbet's* caſe. Dalt. Sher. 135. But if the profits of the land are diminiſhed or waſted by drowning of water, or by lightning, or by any other act of God, without the fault or negligence of the conuſee or plaintiff, he ſhall hold over the land until he be ſatisfied his debt, becauſe he is not in any fault. 15 H. 7. 14 b. 4 Rep. 82. b. Dalt. *Sher.* 133.

But no perſon can have a *ſcire facias* to account and have the land again, but the conuſor, or defendant: therefore if the conuſor or defendant, after the recognizance or judgment, grants a rent charge, and the conuſee be ſatisfied, the grantee may diſtrain, and in replevin or other action brought for taking the diſtreſs, iſſue may be taken whether the conuſee has levied his debt, coſts and damages or not. Sir *W. Jones*. 456. *Harewell* v. *Burwell*. S. C. Cro. Car. 597, 598.

DE

Termino Paſchæ.

Anno Regni, Car. II. 22.

Caſe 11.

Roberts *verſus* Mariett.

Mich. 21 Car. II. Regis. Rot. 123.

S. C 1 Mod. 42. 2 Keb. 614. 618. The court after demurrer joined gave the plaintiff leave to diſcontinue, on payment of coſts(1).

DEBT on bond conditioned to perform an award, ſo as the award be ready to be delivered on the 1ſt day of *May*; the defendant after oyer of the condition pleads, "no award made," and the plaintiff in his replication ſhews the award, and a breach of it by non-payment of the money awarded to be paid by the defendant to the plaintiff: but in the replication the plaintiff miſtakes the day of tendering the

(1) So after demurrer argued and allowed, the court has permitted a diſcontinuance, on payment of coſts, where there was a miſtake in the plaintiff's pleading. 2 Lev. 124. *Rea* v. *Burnis*, Ibid. 209. *Eut* v. *Withens*, 1 Lev. 191. *Jones* v. *Pope*, S. C. 1 Saund. 39. 1 Sid. 306. 1 Lev. 192. *Bennet* v. *Filkins*, S. C. 1 Saund. 23. 1 Lev. 298. *Martin* v. *Delboe*, 3 Lev. 440. *Stephens* v. *Cooper*, 1 Stra. 76. *Butler*, v. *Maliſſy*, Ibid. 116. *Henderſon* v. *Williamſon*; but now the court uſually gives the party leave to *amend* upon payment of coſts. And after a *ſpecial* verdict, the plaintiff may diſcontinue by leave of the court, becauſe it is not complete and final: this however is a matter of great favor. 1 Salk. 178. *Price* v. *Parker*. And the court will not grant leave in a hard action. Caſes temp. Hardw. 200, 201. *Boucher* v. *Lawſon*. Nor will they do it, to give the plaintiff an opportunity of adducing freſh proof to contradict the verdict. 2 Black. Rep. 815. *Roe* v. *Gray*. And leave to diſcontinue is never granted after a *general* verdict. 1 Lev. 48. Anon. 1 Salk. 178. *Price* v. *Parker*, or after a writ of inquiry executed and returned. Carth. 86. *Stephens* v. *Etherick*, S. C. 1 Show. 63. Or after a peremptory rule for judgment on demurrer. 1 Salk. 179. *Turner* v. *Turner*.

award, and avers that the award was ready to be delivered on the *twentieth* day of *May*, whereas it ought to have been upon the *firſt* day of *May*, and upon demurrer joined the record was read in the laſt *Hilary* term, and the court gave a rule for judgment for the plaintiff, unleſs cauſe, &c. at the beginning of this term.

And now *Baldwyn* ſerjeant, for the defendant, ſhewed to the court this miſtake, whereupon *Saunders* for the plaintiff prayed leave to diſcontinue the action, upon payment of coſts; which was oppoſed by *Baldwyn*, becauſe the action was upon a penal bond, and the plaintiff had a remedy for his debt on the award itſelf; and becauſe the plaintiff himſelf had put it upon the judgment of the court, and obtained a rule for judgment before this exception was taken, he prayed judgment for the defendant, and that the plaintiff ſhould be barred of his action upon the bond; and he ſtrongly urged that the plaintiff may bring his action upon the award, and therefore he ought not to be permitted to take advantage of a penalty, as he will do in this caſe, if he ſhall be permitted to diſcontinue.

Kelynge chief juſtice ſaid to *Saunders*, why cannot you bring an action upon the award? To which *Saunders* anſwered, Sir, perhaps the defendant may wage his law to ſuch action (2), and then we have entirely loſt our debt. Then he aſked *Baldwyn* if his client would bring the money awarded into court? who anſwered, that he had not any authority to offer it; whereupon the chief juſtice, with the aſſent of the other judges, becauſe the miſtake was in ſo ſmall a matter, and the plaintiff had a juſt debt due to him, gave the plaintiff leave to diſcontinue the action upon payment of coſts, and he did ſo accordingly.

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(2) And therefore debt does not lie againſt an executor or adminiſtrator upon an award made in the life time of the teſtator or inteſtate, if he demurs to the declaration. Cro. Eliz. 557. *Hampton* v. *Boyer*, 600. *Bowyer* v. *Garland*. 2 Roll. Abr. 107. (C.) pl. 3. But if the executor or adminiſtrator pleads in bar to the action, and a verdict is found againſt him, he cannot take advantage of it afterwards, either in arreſt of judgment, or by writ of error. Plow. 182 a. *Norwood* v. *Read*. 10 H. 6. 25. a. Fitz. Executors, 21. Vaug. 97—100. *Edgcombe* v. *Dee*. Cro Jac 47. *Fiſher* v. *Richardſon*, S. C. Yelv. 55. 1 Sid. 333. *Palmer* v. *Lawſon*.

Caſe 12. **Taylor *verſus* Wells.**

S. C. 1 Mod. 46. 2 Sid. 445. 2 Keb. 623 640. Trover, for *ten pair of curtains and valence*, is certain enough.

TROVER; upon the general iſſue pleaded, and a verdict for the plaintiff, it was moved in arreſt of judgment, that the plaintiff had declared for ten pair of curtains and valence, which was urged to be uncertain, and entire damages being aſſeſſed by the jury, the plaintiff could not have judgment for any part; wherefore the judgment was ſtaid.

And afterwards *Saunders* moved for judgment; and ſaid that the words were certain enough, and ſhould be taken to be ten pair of curtains, and ten pair of valence, which ſhould be intended to be ſuch as were uſually part of the furniture of a bed. And in artificial things ſuch as they are, no other deſcription was neceſſary but to name them by the uſual name by which they were commonly called, without ſhewing the quantity of goods, or the ſtuff of which they were wrought.

And of ſuch opinion were *Kelynge* chief juſtice, *Rainsford* and *Morton* juſtices, who ſeverally delivered their opinions; but *Twyſden* juſtice *contra totis viribus*, and he ſtrongly urged the caſe of *Webb* v. *Waſhborn*, Style's Rep. 352. where it was adjudged as here, that four pair of hangings was uncertain (1). And he ſaid it was as uncertain in this caſe as in that;

(1) In the infancy of this action, it was held neceſſary, in a declaration in trover, to aſcertain the goods, which were the ſubjects of diſpute, with as much certainty and accuracy, as was required in an action of detinue or replevin. Therefore where the declaration was for a *parcel* of lings, without ſpecifying the quantity it contained, though there was a verdict and judgment for the plaintiff, it was reverſed upon error. Cro. Eliz. 865. *Gramvel* v. *Rhobotham*. And a few years before, it was adjudged, that *treſpaſs* for breaking the plaintiff's cloſe, *and taking his fiſh*, without ſtating the nature and number of the fiſh, was bad after verdict. 5 Rep. 34. b. *Playter*'s caſe. But this omiſſion, it ſhould ſeem, would now be holden to be cured after verdict, either at common law, Cro. Jac. 435. *Johns* v. *Wilſon*; or by the ſtatute of *jeofails* 16 & 17 Car. 2. c. 8.: and after a general demurrer, or judgment by default, by ſtat. 4 Ann. c. 16. ſ. 1, 2. even if the action were merely for taking the plaintiff's fiſh; but if the declaration were for *breaking the cloſe*, as well as for taking his fiſh, with-

that; but notwithſtanding his opinion, the plaintiff had judgment by the opinion of the three other juſtices.

without ſpecifying their number or kind, it ſeems it would be good even upon a ſpecial demurrer, becauſe breaking the cloſe is conſidered as the principal ground and foundation of the action, and taking the fiſh as matter of aggravation only. 2 Salk. 643. *Layton* v. *Grindall.* 3 Wilſ. 252 *Chamberlain* v. *Greenfield.* So trover for 200 weights of lead, and 200 weights of braſs, without ſhewing the quantity, was held too uncertain after verdict Sty. 247. *Powell* v. *Hopkins.* S. P. Latch. 216. *Walter* v *Farmer.*

But the law does not now require ſo much preciſion and certainty in the deſcription of the goods, as formerly: for if they are deſcribed according to common acceptation, it is ſufficient. Thus trover for 400 "*ends*" of deal boards was adjudged to be ſufficient, becauſe workmen call all ſuch ſhort pieces of boards, as are not fit for wainſcoting, flooring and the like, "*ends*," and being a particular term well underſtood, is a proper denomination for all ſhort pieces of boards. 2 Ld. Raym. 1219. *Knight* v. *Barker.* 11 Mod. 65. S. C. So trover for two *ſacks* of flax, and two *packs* of hemp, without ſetting out the weight or quantity of a pack, is good after verdict, and it ſeems, even upon a ſpecial demurrer; for it is held that the defendant may plead the judgment in the action *in bar* to any other brought for the ſame thing; and if, in ſuch new action, the plaintiff ſhould declare of taking ſo much hemp or flax by *weight*, or in *quantity*, the defendant may aver that the packs in the firſt action contained that weight or quantity. 2 Ld Raym. 991. *Thorneton* v. *Bernard:* though it was formerly ſuppoſed, that the defendant could not plead it, which appears to have been the chief reaſon of requiring ſo much certainty in a declaration in trover. So trover for three *ricks* or *ſtacks* of hay, without alleging the quantity which each rick contained, is held to be good. 1 Mod. 289. *Wood* v. *Davies.* 1 Lev. 301. S. C. So for ſix *parcels* of lead. *Green* v. *Green*, cited 1 Vent. 106. *Jemey* v. *Norris*; or for a *library* of books without expreſſing what they are, *Emery's* caſe cited 1 Vent. 114. *Elpicke* v. *Aſton*; or two pieces of *cloth.* Sty. 419. *Iſles* v. *Windſor.* So trover for a *ſuit* of knots was held ſufficiently certain. 2 Show. 315. *Parkhurſt* v. *Sheſton.* Skin. 142. S. C. or for a *parcel* of thread without mentioning the quantity or quality of it. 1 Lev. 303. *Jenny* v. *Norris*; for it is certain enough in this action, where *damages* only are to be recovered, and not the thing itſelf. S. P. 1 Ld. Raym. 191. *Copleſton* v. *Piper, per Powell* J. So trover for three pieces of brandy-wine, and for four pieces of drawn graſett. was held good on demurrer. 1 Lord Raym. 192. So trover for 10 *weights*, for if the jury can underſtand the goods, it ſeems to be ſufficient, and damages only are to be recovered; otherwiſe *in detinue*, where the thing itſelf is to be recovered. 12. Mod. 3. *Hook* v. *Galloway*, ſee alſo 2 Vent. 78. *Chamberlain* v. *Cooke.* So trover for ſo many ounces of cloves, mace, and nutmegs, without ſpecifying the quantity of each, was adjudged good

good after judgment by default, 1 Ld. Raym. 588. *Hartfort* v. *Jones*. 2 Salk. 654. S. C. So for a *piece* of tepee, without ſaying how many yards it contained. 2 Str. 738. *Radley* v. *Rudge*. And trover for a *parcel* of diamonds was held good in the C. B, affirmed in error in K. B., and afterward in parliament. Str 827. *White* v *Graham*. So trover for 50 pieces of ſquare timber wood, was held well on error. *Haſegrave* v. *Thomſon*, cited 2 Str. 810. So trover for a *parcel* of packcloths, rappers and cords, was held well on error in K. B. after judgment by default in C. B. notwithſtanding the uncertainty of the quantity which a parcel contains. 2 Str. 8 9. *Bottomley* v. *Harriſon*. 2 Ld. Raym. 1529. S. C. So trover, or treſpaſs, for *divers quantities* of china ware, earthen ware, and linen, without ſetting forth the particulars, was held good after judgment by default. Barnes 276. *Hobbs* v. *Green*. So trover for "old iron," was held good after verdict. Willes's Rep. 70. *Talbot* v. *Spear*.

Great certainty, however, and accuracy, in the deſcription of the things demanded, is ſtill required *in detinue*, becauſe the plaintiff may deſire to recover the ſpecific things themſelves, which can only be done in this action. Willes's Rep. 120. *Kettle* v. *Bromfall*. But with reſpect to *repievin*, although it was formerly holden, that the declaration in replevin muſt alſo be certain and particular in ſetting forth the number, kind and qualities, of the cattle or things diſtrained, becauſe the ſheriff cannot otherwiſe tell how to make deliverance of the ſame; as where the plaintiff declared, that the defendant took 100 ewe and wether ſheep of the plaintiff, and there being a verdict for the plaintiff, an exception was taken to the declaration, that the number of the ewes and wethers was not aſcertained, for the ſheriff, being bound to make a return of each ſort according to the writ, ought to have ſufficient certainty within the record to enable him to do ſo, which the court agreed to, and thereupon arreſted the judgment; All. 33. *More* v. *Clypſam*. Sty. 71. S. C.; yet, notwithſtanding this caſe, it ſeems to be now ſettled, that a declaration in replevin being certain to a general intent, is ſufficient, eſpecially after verdict. As where the declaration was for taking divers goods and chattels, to wit, a certain *parcel* of lint, and a certain *parcel* of paper; the defendant avowed for rent; and after a verdict for the plaintiff, an exception was taken in arreſt of judgment, that the declaration was uncertain in not ſpecifying the quantities contained in the parcels: but *Parker* C. J. who delivered the opinion of the court, ſaid, that the declaration would undoubtedly have been ill on demurrer, but the defendant having avowed the taking of *the goods in the declaration*, the avowry had cured the defect, as thereby both parties were agreed what the goods were; and the defendant himſelf having prayed a return of them, there was no controverſy between him and the plaintiff about them: and to oblige the plaintiff to a greater certainty would have been of no ſervice; for if he had demanded 500 reams of paper and proved only one, he muſt recover; *for in torts if the plaintiff prove any part of his caſe it is ſufficient*: and, as to the difficulty of delivering the goods upon a *retorno habendo*, in caſe the avowant prevailed, he ſaid there was no weight in that objection; for the ſheriff, when he came

came to make a return, might have the defendant's aſſiſtance to ſhew him which were the goods; and he was not obliged to execute the writ, unleſs ſomebody attended to point out the things he was to deliver; and it is a good return for him to make "*quod nullus venit ex parte* "*defend' ad oſtend' averia.*" Raſt. 570. b. Dalt. Sher. 274, and the caſe of *More* v. *Clypſam* was fully conſidered, and over-ruled. 4 Bac. Abr. 387. *Kempſton* v. *Nelſon.* MSS. caſe.

So where in replevin the plaintiff declared for taking fourteen ſkimmers and ladles, and three pots and covers; the defendant avowed the taking for rent in arrear upon a demiſe; the plaintiff traverſed the demiſe, and iſſue being joined thereon, there was a verdict for the plaintiff, that there was no ſuch demiſe; and afterwards an objection was taken to the declaration in arreſt of judgment, that the deſcription of the goods, namely fourteen ſkimmers and ladles, without ſhewing how many of each ſort, was too uncertain; but the court of K B when Lord *Hardwicke* was chief juſtice, over-ruled the objection upon the authority of the above-mentioned caſe of *Kempſton* v. *Nelſon*, and held the deſcription under theſe circumſtances ſufficiently certain. Caſes temp. Hardw 113. *Bern* v. *Mattaire.* 2 Str. 1019. S. C.

Mauleverer *verſus* Hawxby.

Caſe 13.

Trinity, 21 *Car.* 2. Regis. Rot. 1511.

Yorkſhire, to wit, } BE it remembered that heretofore, to wit, in Hilary term laſt paſt, before our lord the king at *Weſtminſter*, came Sir *Richard Mauleverer* knight and baronet, late ſheriff of the county of *York*, by *John Stone* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *Thomas Hawxby* of *Wallowthwait* in the county of *York* yeoman, otherwiſe called *Thomas Hawxby* of *Wallowthwait* in the ſaid county yeoman, in the cuſtody of the marſhal, &c. of a plea of debt, and there are pledges of proſecution to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Yorkſhire*, to wit, Sir *Richard Mauleverer* knight and baronet, late ſheriff of the county of *York*, complains of *Thomas Hawxby* of *Wallowthwait* in the county of *York* yeoman, otherwiſe called *Thomas Hawxby* of *Wallowthwait* in the ſaid county yeoman, being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, of a plea that he render to him 190l. of lawful money of *England*, which

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Debt on bond.

MAULEVERER v. HAWXBY.

which he owes to, and unjuſtly detains from him; for that whereas the ſaid *Thomas*, on the 3d day of *October*, in the 20th year of the reign of our lord *Charles* the ſecond now king of *England*, &c. at *Rippon* in the ſaid county, by his certain writing obligatory, ſealed with the ſeal of the ſaid *Thomas*, and to the court of our ſaid lord the king now here ſhewn, the date whereof is the ſame day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the ſaid Sir *Richard*, by the name of Sir *Richard Mauleverer* knight and baronet, ſheriff of the county of *York*, (he the ſaid Sir *Richard* then being ſheriff of the county of *York* aforeſaid,) in the ſaid 190l. to be paid to the ſaid Sir *Richard*, when he the ſaid *Thomas* ſhould be thereunto afterwards required, yet the ſaid *Thomas* (although often required,) has not yet paid the ſaid 190l. to the ſaid Sir *Richard*, but to pay the ſame to him has hitherto altogether refuſed and ſtill refuſes, to the damage of him the ſaid Sir *Richard* of 20l. And therefore he brings ſuit, &c.

Imparlance.

And now at this day, to wit, on *Friday* next after the morrow of the Holy Trinity in this ſame term, until which day the ſaid *Thomas Hawxby* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter*, come as well the ſaid Sir *Richard Mauleverer* by his attorney aforeſaid, as the ſaid *Thomas* by *Henry Thompſon* his attorney.

Defendant prays oyer of the bond.

And the ſaid *Thomas* defends the wrong and injury when, &c. and prays oyer of the ſaid writing obligatory, and it is read to him in theſe words, to wit,

Bond ſet forth.

"Know all men by theſe preſents, "that we *William Markinfield* of *Markinton* in the county "of *York* gent. and *Thomas Hawxby* of *Wallowthwait* in the "ſaid county yeoman, and *John Atkinſon* of *Markinton* in "the ſaid county yeoman, do acknowledge and confeſs our-"ſelves to owe and be indebted unto *Richard Mauleverer* "knight and baronet, high ſheriff of the county aforeſaid, "in the whole and juſt ſum of one hundred and ninety "pounds of good and lawful money of *England*, to be paid "unto the ſaid ſheriff, or his certain attorney, for which "payment well and truly to be made, we do jointly and "ſeverally binds us, and every of us, our heirs, executors, "adminiſtrators and aſſigns, firmly by theſe preſents, ſealed "with our ſeals, and dated the third day of *October*, in the "twentieth

" twentieth year of king *Charles* the ſecond, and in the year " of our Lord one thouſand ſix hundred and ſixty-eight." which being read, he the ſaid *Thomas* alſo prays oyer of the condition of the ſaid writing obligatory, and it is likewiſe read to him in theſe words, to wit, " The condition of this " obligation is ſuch, that if the above bound *William Mark-* " *infield* be and appear before our ſaid lord the king at " *Weſtminſter*, on *Saturday* next after the octave of St. " Martin, to anſwer *John Booth* gentleman of a plea of " treſpaſs, and alſo to a bill of the ſaid *John* againſt him " the ſaid *William* for ſixty pounds of debt, and againſt him " the ſaid *William* for thirty two pounds and ten ſhillings " more of debt, according to the cuſtom, &c. then *the con-* " *dition* of the obligation to be void and of none effect, or " elſe the ſame to be in full power and virtue," which being read and heard, he the ſaid *Thomas* ſays, that the ſaid Sir *Richard* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, that at the parliament of the lord *Henry* the ſixth after the conqueſt, heretofore king of *England*, &c. holden at *Weſtminſter* on the 25th day of *February*, in the 23d year of his reign, it was (amongſt other things) enacted, by the authority of the ſaid parliament, that ſheriffs, under-ſheriffs, ſheriffs' clerks, ſtewards or bailiffs of liberties, ſervants or bailiffs, or coroners, ſhould not take under colour of their office, by themſelves, or by any other perſon to their uſe, of any perſon for making a return or panel, any thing as for a copy of the panel, except four-pence; and that the ſaid ſheriffs and all other the officers and miniſters aforeſaid, ſhould let out of priſon all and all manner of perſons by them, or either of them arreſted, or being in their cuſtody by virtue of any writ, bill or warrant in any action perſonal, or by cauſe of indictment of treſpaſs, upon reaſonable ſecurity of ſufficient perſons having ſufficient within the county where ſuch perſons ſhould be let to ſecurity or mainpriſe, to keep their days in ſuch places where the ſaid bills, writs or warrants ſhould require (ſuch perſon or perſons who ſhould be or then were in their cuſtody by condemnation, execution, *capias utlagatum*, or *excommunicatum*, ſurety of the peace, and all ſuch perſons who were or ſhould be committed by the ſpecial command of

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and alſo of the condition, which is ſet forth,

and pleads the ſtatute 23 H. 6. c. 9. of ſheriffs' bonds.

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any juſtice, and vagabonds refuſing to ſerve according to the form of the ſtatute of laborers, only excepted) and that no ſheriff, nor any of his officers or miniſters aforeſaid, ſhould take, or cauſe to be taken, or make any obligation for any cauſe before recited, or by colour of his office, but only to themſelves of any perſon, nor by any perſon who ſhould be in their cuſtody by courſe of law, unleſs by the name of their office, upon condition that the ſaid perſons ſhould appear at the day in the ſaid writs, bills, or warrants, and in ſuch places where the ſaid writs, bills, or warrants ſhould require. And if any of the ſaid ſheriffs, or officers, or miniſters aforeſaid, ſhould make or take any obligation in any other form, by colour of their office, that the obligation ſhould be void, as by the ſaid act (among other things) is more fully manifeſt, and appears. And the ſaid *Thomas* further ſays, that after the making of the ſaid act of parliament, and before the making of the ſaid writing obligatory, to wit, on the 10th day of *June*, in the 20th year of the reign of our lord *Charles* the ſecond, now king of *England*, &c. the ſaid *John Booth* proſecuted out of the court of our ſaid lord the king before the king himſelf at *Weſtminſter*, (the ſaid court then being at *Weſtminſter* in the county of *Middleſex*) a certain writ of our ſaid lord the king, called a *latitat*, to the then ſheriff of the county of *York* directed, by which ſaid writ our ſaid lord the king commanded the ſaid ſheriff of *Yorkſhire*, that he ſhould take *William Markinfield* gent. if he ſhould be found in his bailiwick, and him ſhould ſafely keep, ſo that he might have his body before our ſaid lord the king at *Weſtminſter*, on *Saturday* next after 15 days of St. *Martin*, to anſwer *John Booth* gent. of a plea of treſpaſs, and alſo to a bill of him the ſaid *John Booth* againſt the ſaid *William* for 60l. debt, and againſt him the ſaid *William* for 32l. and 10s. more, according to the cuſtom of the court of our ſaid lord the king before the king himſelf to be exhibited, and that he ſhould have there that writ. Which ſaid writ afterwards, and before the return thereof, to wit, on the laſt day of *September*, in the 20th year aforeſaid, at the caſtle of *York*, in the county aforeſaid, was delivered to the ſaid Sir *Richard Mauleverer*, being then ſheriff

J. P. ſued out a *latitat* againſt W. M. directed to the then ſheriff of Y.

and delivered to the ſheriff.

ſheriff of the ſaid county of *York*, to be executed in form of law; by virtue of which ſaid writ the ſaid Sir *Richard*, afterwards, and before the return of the ſaid writ, to wit, on the ſaid 3d day of *October*, in the 20th year aforeſaid, at the caſtle of *York* aforeſaid, in the county aforeſaid, (the ſaid Sir *Richard* then and there being ſheriff of the ſaid county of *York*) took and arreſted the ſaid *William*, and then and there detained him in priſon, until the ſaid *William*, and the ſaid *Thomas*, together with the ſaid *John Atkinſon*, as his ſureties, ſealed, and as their deed delivered the ſaid writing obligatory above-mentioned to the ſaid Sir *Richard*. And the ſaid *Thomas* further ſays, that the ſaid Sir *Richard* then and there took the ſaid writing obligatory, with the ſaid condition underwritten, and from the ſaid *William Markinfield*, and of and from the ſaid *Thomas* and *John*, as his ſureties, by colour of the office of ſheriff of the ſaid county, againſt the form of the ſtatute. And ſo the ſaid *Thomas* ſays, that the ſaid writing obligatory, with the condition thereto above recited, ſo as aforeſaid made and taken, in form and for the cauſe aforeſaid, is void in law. And this he is ready to verify; wherefore he prays judgment, if he ought to be charged with the debt aforeſaid, by virtue of the writing obligatory aforeſaid.

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General demurrer in the uſual form, and joiner in demurrer.

But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſſes, a day thereof is given to the parties aforeſaid before our lord the king at *Weſtminſter*, until the next after to hear their judgment of and upon the premiſſes, becauſe the court of our lord the king now here is thereof not yet, &c.

Curia adviſare vult.

Caſe 13. **Mauleverer *verſus* Hawxby.**

Trinity, 21 *Car.* II. Regis. Rot. 2511.

B.C. 1 Sid. 456. 2 Mod. 35, 36. 3 Keb. 625.

If the condition of a bond be in this form, "the "condition of "this obligation "is ſuch, that "if, &c. then "the *condition* of "this obligation "to be void," the laſt words are void, and the condition is good without them.

DEBT upon bond, by *Mauleverer* late ſheriff of *Yorkſhire*, againſt *Hawxby*, and declares upon a bond entered into by the defendant to the plaintiff, by the name of his office of ſheriff of *Yorkſhire*, on the 3d of *October* in the 20th year of the reign of the now king; the defendant prays oyer of the condition, which is entered in this manner, to wit, "The condition of this obligation is ſuch, that if the above-"bounden *William Markinfield* be and appear before our lord "the king at *Weſtminſter* on *Saturday* next after the octave "of St. *Martin*, to anſwer *John Booth* of a plea of treſpaſs; "and alſo to a bill of the ſaid *John* againſt him the ſaid "*William* for 60l of debt, and againſt him the ſaid *William* for "32l. 10s. more of debt, according to the cuſtom &c. then "the *condition* of this obligation to be void and of none effect, "or elſe the ſame to be in full power and virtue," and thereupon the defendant pleads the ſtatute 23 H. 6. c. 9. of ſheriffs' bonds; and further ſays, that *Markinfield* was arreſted by the plaintiff, then ſheriff of the county of *York*, by virtue of a *latitat* out of this court, and the defendant, for the enlargement of *Markinfield*, entered into the bond with the condition aforeſaid, which by force of the ſtatute was void in law, and to which there was a demurrer.

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And the exception taken by the defendant was to the condition of the bond, in which it is ſaid, that if *Markinfield* appear, &c. then the *condition* of this obligation ſhall be void, &c. where it ſhould be, then this *obligation* ſhall be void, &c. And it was argued for the defendant, that if *Markinfield* had appeared at the return of the writ, the bond would be in force againſt the defendant; for it is ſaid, that the condition ſhall be void, and then the bond will be ſingle. And a ſingle (*b*) bond is altogether void by the ſtatute, which requires ſuch bond to be with a condition for the appearance

(*b*) S. P. Dy. [illegible] b. [illegible] 100 b. [illegible] caſe.

of

of the priſoner at the day contained in the writ (*c*); but there is no condition to this bond, but only a condition to a condition, in which it is ſaid, that the condition ſhall be void, but not that the bond ſhall be void; and ſo there are no words at all to make the bond void: and whether *Markinfield* had appeared or not, the bond is ſingle and without a condition, and therefore the bond is againſt the ſtatute; and for this reaſon judgment was prayed for the defendant.

(*c*) Dy. 364. a. in marg.

But it was anſwered and reſolved by the court, that the bond was good enough; for the words "then the condition," &c. are void for their abſurdity and repugnancy; and no more regard is to be paid to them, than if they had been omitted, and they muſt be taken in the ſame ſenſe as if the words had been, "then this *obligation* ſhall be void." And if the whole clauſe had been omitted, the bond and condition would have been good enough, for after the bond comes the condition in this manner, The condition of this obligation "is ſuch, that if the ſaid *Markinfield* appear," &c. which words alone ſhew that the bond was taken for the appearance of *Markinfield*, which is all that the ſtatute requires, though the clauſe, "then this obligation ſhall be void," had been wholly omitted. And now the addition of uſeleſs and impertinent words ſhall not hurt the bond and condition which were perfect before. Wherefore judgment was given for the plaintiff. *Saunders* of counſel with the plaintiff.

The addition of uſeleſs and impertinent words do not hurt a bond and condition which were perfect before.

Note; The defendant's attorney had ſubtilely averred in his plea, that *Markinfield* was arreſted by a writ returnable at another day than was contained in the condition of the bond (*f*); but this being a trick he did not dare to take advantage of it, as he told me afterwards. And note, the like judgment was given upon ſuch proceedings on the ſame bond, between *Mauleverer* and *Atkinſon*, and between *Mauleverer* and *Markinfield*, in this term; and the roll is in Mich. 21 *Car.* 2. Regis. Rot. 299 and 300 (1).

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(*f*) See 1 Saund. 22. Bennet v. Filkins.

(1) See *ante*, 59. *Poſterne* v. *Hanſon*, note 3.

Case 14.

Richards & al' *verſus* Hodges.

Trinity, 21 *Car.* 2. Regis. Rol. 282.

Nottinghamſhire, to wit, } BE it remembered that heretofore, to wit, in Eaſter term laſt paſt, before our lord the king at *Weſtminſter* came *Samuel Richards* and *Francis Samon*, church-wardens of the pariſh of St. *Peter*, in the county of the town of *Nottingham*, by *Ralph Edge* their attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *John Hodges* of the town of *Nottingham*, in the county of the town of *Nottingham*, iron-monger, in the cuſtody of the marſhal, &c. of a plea of debt, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Nottinghamſhire*, to wit, *Samuel Richards* and *Francis Samon*, church-wardens of the pariſh of St. *Peter*, in the county of the town of *Nottingham*, complain of *John Hodges* of the town of *Nottingham*, in the county of the town of *Nottingham*, ironmonger, being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, of a plea that he render to them 100l. of lawful money of *England*, which he owes to, and unjuſtly detains from them, for that whereas the ſaid *John*, on the 1ſt day of *Auguſt*, in the 19th year of the reign of our lord *Charles* the Second now king of *England*, &c. at *Bingham*, in the ſaid county of *Nottingham*, by his certain writing obligatory, ſealed with the ſeal of the ſaid *John*, and to the court of our ſaid lord the king now here ſhewn, the date whereof is the ſame day and year aforeſaid, acknowledged himſelf to be held and firmly bound to the ſaid *Samuel* and *Francis*, in the ſaid 100l., to be paid to the ſaid *Samuel* and *Francis*, when he ſhould be thereunto requeſted. Yet the ſaid *John* (although often required) has not yet paid the ſaid 100l. to the ſaid *Samuel* and *Francis*, or either of them, but to pay the ſame to them has hitherto altogether refuſed, and ſtill refuſes; to the damage of them the ſaid *Samuel* and *Francis* of 10l. And therefore they bring ſuit, &c.

Debt on bond.

And

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And now at this day, to wit, on *Friday* next after the morrow of the Holy Trinity in the ſame term, until which day the ſaid *John* had leave to imparl to the ſaid bill and then to anſwer, before our lord the king at *Weſtminſter* come as well the ſaid *Samuel* and *Francis* by their attorney aforeſaid, as the ſaid *John* by *Ralph Gregge* his attorney. And the ſaid *John* defends the wrong and injury when, &c. and prays oyer of the ſaid writing obligatory, and it is read to him, &c. and he alſo prays oyer of the condition of the ſaid writing obligatory, and it is read to him in theſe words, to wit, "The condition of this preſent obligation is ſuch, that whereas *Mary Bates* hath been of late delivered of a man-child within the pariſh of St. *Peter*'s, within the ſaid town of *Nottingham*, to the which child the above-bounden *John Hodges* according to law ſtands charged to be the reputed father; if therefore the ſaid *John Hodges*, his heirs, executors, adminiſtrators or aſſigns, or any of them, do from time to time and at all times hereafter, fully and clearly acquit, diſcharge and ſave harmleſs, as well the above-mentioned *Samuel Richards* and *Francis Samon*, church-wardens of the pariſh of St. *Peter*'s aforeſaid, and their ſucceſſors for the time being, and every of them, as alſo the inhabitants and pariſhioners of the ſaid pariſh, which now are, or hereafter ſhall be for the time being, and every of them, of and from all and all manner of coſts, charges, troubles and incumbrances whatſoever, for or by reaſon of the birth, education, maintenance, nourithing and bringing up of the ſaid child, and of and from all other actions, ſuits, charges, troubles and demands whatſoever, touching or concerning the ſame, that then this preſent obligation to be void and of none effect, or elſe to remain, continue and be in full force, ſtrength, power and virtue." Which being read and heard, the ſaid *John Hodges* ſays, that the ſaid *Samuel Richards* and *Francis Samon* ought not to have or maintain their ſaid action thereof againſt him, becauſe he ſays, that the ſaid *Samuel Richards* and *Francis Samon*, church-wardens as aforeſaid of the pariſh of St. *Peter* aforeſaid, and their ſucceſſors, and the inhabitants and pariſhioners of the ſaid pariſh for the time being, from the time of making the ſaid writing obligatory hitherto, or either of them, were not in any manner damnified for

Imparlance.

Defendant prays oyer of the condition of the bond, which is ſet *out* in *hæc verba*,

and pleads *non damnific.atus.*

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for or by reaſon of the birth, education, maintenance, nouriſhing and bringing up of the ſaid child, in the condition aforeſaid above-named, or for or by reaſon of any actions, ſuits, charges, troubles or demands whatſoever, touching or concerning the ſaid child: and this he is ready to verify; wherefore he prays judgment if the ſaid *Samuel Richards* and *Francis Samon* ought to have or maintain their ſaid action thereof againſt him, &c.

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Replication. The pariſhioners to prevent the child from ſtarving maintained it for a month.

And the ſaid *Samuel* and *Francis* ſay, that, by any thing by the ſaid *John* above in pleading alleged, they ought not to be barred from having their aforeſaid action thereof againſt him the ſaid *John*, becauſe they ſay, that the ſaid child in the ſaid condition mentioned was born within the pariſh of *St. Peter* aforeſaid, and that neither the ſaid *John Hodges*, nor any other perſon, after the making of the ſaid writing obligatory, and before the day of exhibiting the ſaid bill of the ſaid *Samuel* and *Francis*, to wit, for the ſpace of one month from the firſt day of *March* in the 21ſt year of the reign of our ſaid lord the now king, provided any maintenance or nouriſhment for the ſaid child: wherefore the pariſhioners of the ſaid pariſh of St. *Peter*, leſt the child ſhould periſh through hunger and cold, during the whole time aforeſaid, at *Bingham* aforeſaid, were obliged to lay out and expend, and did lay out and expend, the ſum of 4*s*. of lawful money of *England*, for the maintenance, nouriſhing and bringing up of the ſaid child for the time aforeſaid, and ſo the pariſhioners are damnified. And this they are ready to verify; wherefore they pray judgment and their ſaid debt, together with their damages on occaſion of the detention of the ſaid debt, to be adjudged to them, &c.

Rejoinder.

That defendant offered to maintain the child at his own expence, but the plaintiffs would not ſuffer him to do ſo, and paid the money of their own wrong.

And the ſaid *John Hodges* ſays, that he the ſaid *John* for the ſaid ſpace of one month from the firſt day of *March* in the 21ſt year aforeſaid, would have nouriſhed and maintained the ſaid child at his own coſts and charges, and on the ſaid firſt day of *March* in the 21ſt year aforeſaid, at *Bingham* aforeſaid, offered to the ſaid *Francis* and *Samuel*, and the ſaid pariſhioners, to nouriſh and maintain the ſaid child at his own coſts and charges, and the ſaid *Francis* and *Samuel*, and the ſaid pariſhioners, then and there refuſed to permit him the ſaid

John

John to nouriſh and maintain the child at his own coſts and charges; but the ſaid *Francis* and *Samuel*, and the ſaid pariſhioners, of their own wrong, and againſt the will of him the ſaid *John*, then and there put the ſaid child to nurſe, and for the nurſing and maintenancee of the ſaid child of their own wrong paid the ſaid four ſhillings. And this he is ready to verify; wherefore, as before, he prays judgment, and that the ſaid *Francis* and *Samuel* may be barred from having their ſaid action thereof againſt him, &c.

General demurrer; and joinder in demurrer.

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Curia adviſare vult.

But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day therefore is given to the parties aforeſaid before our lord the king at *Weſtminſter*, until next after to hear their judgment of and upon the premiſſes, becauſe the court of our lord the king here is thereof not yet adviſed, &c.

Richards & al' *verſus* Hodges.

Caſe 14.

Trin. 21 *Car.* 2. Regis. Rot. 882.

DEBT upon bond by *Richards* and *Samon* againſt *Hodges*: the defendant prays oyer of the condition, which is, "That whereas *Mary Bates* hath been of late delivered of a man-child within the pariſh of *St. Peter*, in the town of *Nottingham*, to the which child the above-bound *John Hodges* according to law ſtands charged the reputed father; if therefore the ſaid *John Hodges*, his heirs, executors, adminiſtrators or aſſigns, or any of them, do from time to time, and at all times hereafter, fully and clearly acquit, diſcharge and ſave harmleſs, as well the above-named *Samuel Richards* and *Francis Samon*, church-wardens of the pariſh of *St. Peter* aforeſaid, and their ſucceſſors for the time being, and every of them, and alſo all the inhabitants and pariſhioners of the ſaid pariſh, which now are or hereafter ſhall be for the time being, and every of them, of and from all manner of coſts, charges, troubles

S. C. 1 Sid. 444. 1 Mod. 43. 2 Keb. 619. If the defendant pleads *non damnificatus* generally, and the plaintiff replies, and ſhews how damnified, and the defendant rejoins that the plaintiff was damnified of his own wrong, it is a departure.

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troubles and incumbrances whatſoever, for or by reaſon of the birth, education, maintenance, nouriſhing or bringing up of the ſaid child, and of and from all other actions, ſuits, charges, troubles and demands whatſoever, touching or concerning the ſame, that then, &c." And upon this the defendant pleads *non damnificatus* generally: the plaintiffs reply that neither the defendant, nor any other, for the ſpace of a month after the making of the bond, provided any maintenance for the infant, wherefore the pariſhioners, to prevent the infant from periſhing with hunger and cold, during the whole time aforeſaid were forced to pay, and had paid 4s., for the maintenance and nouriſhment of the infant, and ſo the pariſhioners were damnified, &c. to which the defendant rejoins, that he would have nouriſhed the infant at his own coſts and charges during the whole of the ſaid time, and offered to do it as well to the plaintiffs as to the other pariſhioners, but they refuſed to permit him to do ſo; and of their own wrong, and againſt the will of the defendant, put the infant to nurſe, and paid the 4s. And this, &c. wherefore, &c. Upon which rejoinder the plaintiffs demurred in law.

And by the court the rejoinder was bad, becauſe it was a departure from the firſt plea in bar: for the defendant in his plea ſays, that the pariſhioners were not damnified: and when the plaintiffs by their replication ſhew how they were damnified, the defendant cannot rejoin, that the damnification was of their own wrong, as he has done here, but ought to have pleaded it at firſt in his plea in bar. And though *Saunders* of counſel with the defendant urged that it was not any damnification at all, becauſe it was the voluntary act of the pariſh to put the infant to nurſe, when the defendant himſelf offered to maintain it, *et volenti non fit injuria*, and they ought not to take advantage of their own wrong; yet *non allocatur*; for the court held clearly, that the rejoinder was a departure; (1.) and therefore it was adjudged for the plaintiffs.

(1) See *Newland* v. *Oſman*, Burn's Juſtice, Baſtard. *Simpſon* v. *Johnſon*, Dougl. 7. 2 Wilſ. 126. In a late caſe, however, ſimilar to the preſent, the plaintiff, inſtead of demurring to the rejoinder, took iſſue upon it; though, upon the authority of this caſe, it ſeems he might have demurred upon it, as being a departure from

from the plea. That was debt on bond by the church-wardens of the pariſh of R. conditioned to indemnify the church-wardens and overſeers of the poor, and the inhabitants and pariſhioners of R. againſt the charges, which ſhould ariſe, or be impoſed upon them, on account of the maintenance, and bringing up of ſuch child or children, as one E. W. then went with, and ſhould be delivered of. The defendant pleaded *non damnificatus*. The plaintiff replied, that the ſaid E. W. was delivered of two children, and that neither the defendant, nor any perſon on his behalf, provided any food or nouriſhment for them: by reaſon whereof, the inhabitants of R., leſt the children ſhould periſh for want of neceſſary food and nouriſhment, were forced and obliged to expend, and did neceſſarily expend 3l. in providing, &c. and ſo were damnified, &c; the defendant rejoined, that no juſtice's order was ever made upon the inhabitants of R. for the maintenance and bringing up of the ſaid children, or for the payment or allowance of the money, &c. and therefore if they did expend, it was of their own voluntary act and wrong, and if they were damnified, it was of their own wrong, &c. The plaintiff took iſſue upon the rejoinder. 1 H. Bl. 253. *Hayes* v. *Bryant*. However this caſe is ſo much like the preſent in principle, that it ſeems no doubt can be entertained, that the rejoinder was a departure, for the defendant ought to have ſtated it in his plea at firſt, though indeed it would have been no defence to the action, if he had, becauſe the court held clearly, that an order of juſtices was not neceſſary to make the officers of the pariſh liable to do, what they were otherwiſe under a legal obligation of doing, namely, to provide neceſſaries for the children.

A departure in pleading is ſaid to be, when a man quits, or departs from the ground which he has firſt relied upon, and has recourſe to another; it is, when his ſubſequent plea does not contain matter purſuant to his former, nor ſupport and fortify it. Co. Litt. 304. a. One reaſon why a departure *in pleading* is never allowed, is, becauſe the record would by ſuch means be ſpun out into endleſs prolixity; for he, who has departed from and relinquiſhed his firſt plea, might reſort to a ſecond, third, fourth, or even fortieth defence; pleading would thereby become infinite; he who has a bad cauſe would never be brought to iſſue, and he who has a good one would never obtain the end of his ſuit. See ſeveral caſes as to what ſhall be a departure, cited 1 Saund. 117. *Cutler* v. *Southerne*, note (3.) Thus, if the declaration be founded on the common law, the plaintiff in his replication cannot maintain it by a ſpecial cuſtom. Co. Litt. 304. a. But if an action be brought to recover a penalty given by ſtatute, and the defendant pleads a repeal of the ſtatute by another act, the plaintiff may reply that the firſt ſtatute was afterwards revived, and it is no departure. Cro. Car. 258. *Butler* v. *Preſident of College of Phyſicians*. So, where in debt on bond with a condition to be a true priſoner without making any eſcape, the defendant pleaded, that J. L. did remain a true priſoner without committing any eſcape, &c. the plaintiff aſſigned a breach, that 13th *January* J. L. made an eſcape; the defendant rejoined, that J. L. went a little way out of the rules of the priſon, but being ſent for back by the plaintiff, he immediately returned with the conſent of the plaintiff, was accepted as his priſoner, and ſo continued ever ſince; to which it was demurred. And by *Reeve* C. J. here is a breach aſſigned, to which

which the defendant rejoins that J. L. did make an eſcape, for he ſays he went out of the rules of the priſon, which is an eſcape at common law, 3 Rep. 44. a. *Boyton*'s caſe, and alſo by ſtatute 8 and 9 W. 3. c. 27. ſ 1.; and then he returned with conſent of the plaintiff; this is a departure, for if it would excuſe the eſcape, it ſhould have been pleaded at firſt. Com Rep. 553. *Gambier* v. *Larkin*. So where in treſpaſs for impounding the plaintiff's mare, the defendant pleaded, that ſhe was doing damage to the king in his foreſt of *Waltham*: the plaintiff in his replication entitled himſelf to a right of common in the foreſt for a mare, and therefore he put the mare there to uſe his common: the defendant rejoined, that the mare was mangy and doing damage, and therefore he took and impounded the mare, becauſe ſhe was wrongfully and unlawfully in the foreſt; the rejoinder was held to be a departure from the plea; becauſe the plea is that the mare was doing a *private treſpaſs* to the king in his foreſt of W. and therefore the defendant impounded her, but the rejoinder is, that the mare was mangy, which, by the ſtatute 32 H. 8. c. 13. ſ. 11. is a *common nuiſance* inquirable in the leet, and therefore the defendant impounded her. 2 Wilſ. 96. *Palmer* v. *Stone*. And where in replevin for taking the plaintiffs *goods and chattels*, to wit, one lime kiln, the defendant avowed for rent in arrear, and the plaintiff in his plea in bar ſaid that the lime-kiln was *affixed to the freehold* of the piece or parcel of ground on which, &c. and as ſuch was by law exempt from a diſtreſs for rent, to which the defendant demurred generally; the court held, that the plea in bar was a departure from the declaration: that the declaration, treating the lime-kiln as a *chattel*, might poſſibly have been true, becauſe lime may be burnt in a portable oven, and the kiln need not therefore neceſſarily be affixed to the freehold; but as the plea in bar ſtated it to be affixed to the *freehold*, it was inconſiſtent with the declaration. 4 Term Rep. 514. *Niblet* v. *Smith*. So where to debt on an annuity bond the defendant pleaded, *that no ſuch memorial* of the bond, as is required to be enrolled in Chancery by the ſtatute 17 Geo. 3., was enrolled, &c. before the commencement of the plaintiff's ſuit; the plaintiff replied, that a memorial of the bond was enrolled, which contained the day of the month and the year when the bond bore date, and the names of all the parties and witneſſes, and ſet forth the annual ſum to be paid, and the name of the perſon for whoſe life the annuity was granted, *and the conſideration of granting the ſame*; the defendant rejoined, *that true it was that the memorial of the bond was enrolled*, but alleged that the memorial did not truly ſet forth the conſideration on which the annuity was granted. The court was clearly of opinion, that the rejoinder was a departure from the plea. A memorial was enrolled, which upon the face of it was a good one; and if the defendant wiſhed to impeach it, he ſhould have pleaded it at firſt, and ſhewn in what particular it was defective, and thus have compelled the plaintiff to take iſſue upon that fact; but, having in his plea in bar, alleged that *there was no memorial*, he ought not afterwards to be permitted to admit in his rejoinder, *that there was one*, and then deny the validity of it; that the words "no ſuch memorial," like the words "no ſuch award," or "no "*capias ad ſatisfaciendum*," tender iſſues

in fact, and not in law; that if the plaintiff had taken iſſue on the allegation of "no ſuch memorial, &c." the parties could not, upon that iſſue, have gone into the objection to the memorial, which ariſes under the act of parliament, any more than they can upon the iſſue of *no award*, where there is an award in fact, go into objections to the award in point of law. 4 Term Rep. 585. *Praed* v. *Dutcheſs of Cumberland*. And where in treſpaſs for impounding the plaintiff's ox, the defendant juſtified the taking damage feaſant, and impounding it; the plaintiff entitled himſelf to common of paſture for one ox in the place in which, &c. and that he put the ox there to uſe his common; the defendant rejoined, that the plaintiff had ſurcharged the common with that ox, and that he took and impounded him ſurcharging the common; it was adjudged, that the rejoinder was a departure from the plea; for there was a great deal of difference between damage feaſant, and a ſurcharge of common; that the ſurcharge ſhould have been pleaded at firſt. 1 Salk. 221. *Counteſs of Arran* v. *Criſpe*; becauſe the defendant then knew the plaintiff's right. Willes's Rep 638. *Ellis* v. *Rowles*. So where in debt on bond given by the defendant on his marriage, with condition that he would permit his intended wife, either during the marriage, or by will, to diſpoſe of 50l. out of his perſonal eſtate, the defendant pleaded that he had not prevented his wife from diſpoſing of that ſum according to the terms of the condition; the plaintiff in his replication ſet forth a particular appointment of the money by the wife according to the condition of the bond, a notice to the defendant of the appointment, a requeſt to pay, and a refuſal by him; the defendant rejoined that he had not any perſonal eſtate out of which he could pay the 5cl.; the rejoinder, on a general demurrer, was held to be bad, becauſe it was a departure from the plea; though it would have been no defence if pleaded at firſt, becauſe the defendant is eſtopped by the condition of his bond to ſay that he had not ſufficient perſonal eſtate. Willes's Rep. 25. *Coſſens* v. *Coſſens*. So where in *aſſumpſit* by an executor on ſeveral promiſes, which were all laid to be made to the *teſtator* in his life time, to which the defendant pleaded the ſtatute of limitations, and the plaintiff replied a ſubſequent promiſe to *himſelf*, the replication was held to be a departure and therefore bad. Ibid. 27. *Hickman* v. *Walker*. And where to debt on bond, the defendant, after praying oyer of the condition, which was for performance of an award, pleaded no award made; the plaintiff replied, and ſhewed an award; the defendant rejoined that other matters were referred, of which the arbitrators had not taken any notice, and therefore it was no award, and thereupon the plaintiff demurred; the court adjudged that the rejoinder was a departure from the plea, for the defendant ought to have pleaded this ſpecial matter in his plea at firſt. 1 Sid. 180. *Morgan* v. *Man*. Sir T. Raym. 94. S. C. and ſee 1 Wilſ. 122. *Harding* v. *Holmes*, which is preciſely the ſame caſe with *Morgan* and *Man*. And if the defendant, in debt on bond conditioned (among other things) for payment of rent reſerved in ſuch an indenture of leaſe, pleads *performance* generally, and the plaintiff aſſigns a breach in non-payment of the rent,

and the defendant rejoins that *he offered* to pay it, this is a departure; for an offer and refuſal is not the ſame as a performance. Cro. Car. 76, 77. *Chapman* v. *Chapman*. See alſo 4 Leon. 79. *Clinton* v. *Bridges*. Dy. 253. b. 2 Mod. 31. *Sams* v. *Dangerfield*. Poſt. 188.

A departure in pleading ſeems to be matter *of ſubſtance*, and bad upon a *general* demurrer, as may be collected from 2 Wilſ. 96. *Palmer* v. *Stone*. 1 Wilſ. 122. *Harding* v. *Holmes*. 4 Term Rep. 504. *Niblet* v. *Smith*. Willes's Rep. 638. *Ellis* v. *Rowles*. 25. *Coſſens* v. *Coſſens*. Ibid. 27. *Hickman* v. *Walker*. 1 Saund. 117. *Cutler* v. *Southern* (note (3.) The only mode of taking advantage of a departure, is by demurrer; for if the defendant, inſtead of demurring, take iſſue upon a replication, containing a departure, and it be found againſt him, the court will not arreſt the judgment. Sir T. Raym. 86. *Lee* v. *Rayner*.

Caſe 15.

Heſketh *verſus* Lee & al'.

Paſch. 21 Car. II. Regis. Rot. 408.

Writ of error.

ENGLAND, *to wit*. OUR lord the king has ſent to his chancellor in his county palatine of *Lancaſter*, or to his deputy there, his writ cloſe in theſe words, to wit; *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to our chancellor in our county palatine of *Lancaſter*, or to his deputy there, greeting: Becauſe in the record and proceedings, and alſo

[85] in the giving of judgment, in a plaint which was in our court at *Lancaſter* by our writ of entry *ſur diſſeiſin in the poſt*, between *Thomas Legh* eſq. and *Alexander Rigby* eſq. and *Thomas Heſketh*, of the manors of *Rufforth*, *Martholme*, *Harwood*, *Longton*, *Croſton*, *Heſketh* cum *Becconſal*, *Tarlton* cum *Sallom*, *Mawdeſley*, *Wrightington*, *Shevington*, *Houghwicke* and *Nether-Wittingham* with the appurtenances, and of 323 meſſuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of paſture, 2000 acres of moor, and 2000 acres of furze and heath with the appurtenances, in *Rufforth*, *Martholme*, *Harwood*, *Longton*, *Croſton*, *Heſketh* cum *Becconſal*, *Tarlton* cum *Sallom*, *Mawdeſley*, *Wrightington*, *Shevington*, *Houghwicke*, *Nether-Wittingham*, *Holmeſwood*, *Tattleworth*, *Lan-*

Lancaſter, *Preſton*, *Wigan*, *Ormſchurch*, *Penwortham*, *Hatton*, *Muchhoole*, *Bretherton*, *Eccieſton* juxta *Croſton*, *Biſpham*, *Newbrowe*, *Newborough* in *Lathom*, *Parbould*, *Samleſbury*, *Newton* cum *Scales*, *Barton* in *Downholland*, *Bickerſtaffe*, *Winſtanley*, and in *Scareſbricke* with the appurtenances in the county of *Lancaſter*, manifeſt error has invented, to the great damage of the ſaid *Thomas Heſketh*, as by his complaint we are informed: We being willing that the error, if any there be, ſhould in due manner be corrected, and full and ſpeedy juſtice done to the parties aforeſaid in this behalf, do command you, that by our writ under the ſeal of the county palatine aforeſaid, you make your mandate to our juſtices at *Lancaſter*, that they ſend to us into the chancery of the ſaid county under their ſeals, the record and proceedings of the ſaid recovery, with all things touching the ſame, which are in their cuſtody, as it is ſaid, before 15 days of *Eaſter*, and our writ, which ſhall thereof come to them, and that you ſend to us diſtinctly and openly under the ſeal of the county aforeſaid, the record and proceedings of the recovery aforeſaid, and this writ, ſo that we may have them in five weeks from the day of *Eaſter*, whereſoever we ſhall then be in *England*, that the record and proceedings of the ſaid recovery being inſpected, we may cauſe to be further done thereupon, for correcting that error, what of right, and according to the law and cuſtom of *England* ought to be done. Witneſs ourſelf at *Weſtminſter*, the 4th day of *February* in the 21ſt year of our reign.

The anſwer of Sir *Thomas Ingram*, knt. chancellor of the county palatine of our lord the king at *Lancaſter* to this writ.

The anſwer of the chancellor of the ſaid county palatine

By virtue of this writ to me directed and delivered, I have, by another writ duly made under the ſeal of the ſaid county palatine, made my mandate to the juſtices within mentioned as within I am commanded; which ſaid juſtices, to wit, Sir *Chriſtopher Turner*, knt. one of the barons of the exchequer of our Lord the now king at *Weſtminſter*, and Sir *Richard Rainsford*, knt. one of the juſtices of our ſaid lord the king aſſigned to hold pleas before the king himſelf, juſtices of our ſaid lord the king at *Lancaſter*, have anſwered, that the record and proceedings of the recovery whereof mention is within

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made, with all things concerning the ſame, they have ſent to me in the ſaid chancery of the county palatine aforeſaid, which ſaid record and proceedings of the ſaid recovery I ſend to our ſaid lord the king at the day within-contained, as within I am commanded.

By the chancellor himſelf.

Original and judicial writs of the ſeſſion holden at *Lancaſter*, on *Friday* the 30th day of *Auguſt*, in the 13th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Lancaſhire* greeting: Command *Thomas Heſketh* eſq. that juſtly and without delay he render to *Thomas Legh* and *Alexander Rigby* eſqrs. the manors of R. M. H. L. C. H. cum B. T. cum C. S. M. W. S. H. and N. W. with the appurtenances, and 323 meſſuage, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of paſture, 2000 acres of moor, and 2000 acres of furze and heath with the appurtenances, in R. M. H. L. C. H. cum B. T. cum. S. M. W. S. H. N. W. H. T. L. P. W. O. P. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances, which they claim to be their right and inheritance, and into which the ſaid *Thomas Heſketh* hath not entry, unleſs after the diſſeiſin which *Hugh Hunt* thereof unjuſtly, and without judgment, hath made to the aforeſaid *Thomas Legh* and *Alexander Rigby*, within 30 years now laſt paſt, as they ſay, and whereof they complain that the ſaid *Thomas Heſketh* deforces them. And unleſs he ſhall do ſo, and if the ſaid *Thomas Legh* and *Alexander* ſhall make you ſecure of proſecuting their claim, then ſummon by good ſummoners the ſaid *Thomas Heſketh*, that he be before our juſtices at *Lancaſter*, on the firſt day of the next general ſeſſion of the aſſizes to be holden there, to ſhew wherefore he hath not done it; and have you there the ſummoners and this writ. Witneſs ourſelf at *Lancaſter*, the 4th day of *Auguſt*, in the 13th year of our reign. *Otway*. For 30l. paid into hanaper by *John Otway*, eſq. for a fine of the within-written, who affirms that the tenements within-written do

not exceed the value of 300l. a year.—Pledges of proſecution, *John Doe* and *Richard Roe*.—Summoners, *John Den* and *Richard Fen*.

Sir *George Middleton* knt. and Bart. ſheriff.

Pleas at *Lancaſter* of the ſeſſion holden there on *Friday* the 30th day of *Auguſt*, in the 13th year of the reign of *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. before Sir *Chriſtopher Turner* knt. one of the barons of the exchequer of our lord the king, and Sir *Robert Bernard* knt. ſerjeant at law, juſtices of our ſaid lord the king at *Lancaſter*. Roll. 7.

Licence under the king's privy ſeal to an infant to ſuffer a recovery.

Our lord the king has ſent, to our juſtices at *Lancaſter*, his letters ſealed under the privy ſeal of our ſaid lord the king in theſe words: *Charles* the 2d, by the grace of God, king of *England*, *Scotland*, *France*, and *Ireland*, defender of the faith, &c. to our truſty and well beloved Sir *Chriſtopher Turner* knt. chief juſtice of the common pleas for the county palatine of *Lancaſter*, and Sir *Robert Bernard* knt. juſtice of our ſaid court of common pleas, and to our chief juſtice and other juſtices of the ſame court for the time being, and to all other our officers and miniſters of the ſame court, greeting. Whereas *Thomas Heſketh* an infant, and *Lucy Molyneux* his mother, and guardian, by their humble petition to us exhibited, have ſhewn unto us, that about the year of our lord God 1641, there was a marriage agreed upon between *Robert Heſketh* the petitioner *Thomas*'s late father, and the petitioner *Lucy*, which was accordingly had and ſolemnized, and that, in purſuance of the ſaid agreement, *Robert Heſketh* the petitioner *Thomas*'s late grandfather, and *Robert Heſketh* the petitioner *Thomas*'s late father, did by indenture dated the 9th day of *November* 1641, for the ſettling of a jointure upon the petitioner *Lucy*, covenant to ſettle all their manors, meſſuages, land, tenements, hereditaments and premiſes, lying within the county palatine of *Lancaſter*, to the uſes in the indenture named; that afterwards it was agreed to ſettle the ſame by act of parliament, and to that end and purpoſe a bill was brought into the parliament then ſitting, but the late differences and diſtractions falling out, it was not proceeded in, and thereupon the ſaid

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petitioner *Thomas*'s late father did by indenture dated the 22d day of *October* 1647, covenant that he would with all ſpeed ſettle the ſaid manors, meſſuages, land and tenements to the uſes in the ſaid indenture mentioned, and in purſuance of the ſaid covenant did by his indenture dated the 14th day of *February* in the year of our lord God 1649, covenant with *Richard Hasforth* and *William Halſall* that, at the then next aſſizes to be holden at *Lancaſter*, he would ſuffer a recovery of ſeveral of the manors, houſes and demeſne lands to the uſes in the ſaid indenture dated the 22d day of *October*, in the year of our lord 1647; and at ſome other aſſizes following would ſuffer another recovery of all the tenements, parcel of the ſaid manors, to ſuch uſes as in the aforeſaid indenture is mentioned. And that in purſuance thereof a recovery was executed of the ſaid manors, houſes and demeſne lands, but before the 2d aſſizes following the ſaid *Robert Heſketh* the petitioner *Thomas*'s late father died, and that by reaſon thereof one part of the petitioner *Thomas*'s eſtate ſtands ſettled and another not, and part of the petitioner *Lucy*'s jointure is aſſured to her and the other not, ſo that the reſt and the reſidue of the ſaid manors, meſſuages, lands and tenements cannot be perfectly ſettled and aſſured according to the aforeſaid covenants and agreements, but by a recovery to be had and ſuffered by the ſaid *Thomas Heſketh* who is within age; the ſaid petitioners have therefore humbly prayed that we would be graciouſly pleaſed, in a caſe of this nature, and of ſo great importance, to give you authority and warrant for ſuffering and paſſing of a recovery of that part of the petitioner's eſtate which is yet unſettled, to the end that the ſame may be ſettled according to the covenants and agreements aforeſaid; know ye therefore that we, favouring the petitioners in this their ſo juſt and humble requeſt, are graciouſly pleaſed, for the reaſons expreſſed in the petition, to condeſcend, that the ſaid *Thomas Heſketh* may either in perſon, or by his able and ſufficient guardian, or prochein-amie, ſuffer ſuch a recovery, of all and ſingular the ſaid premiſes in the ſaid petition mentioned which were not formerly ſettled, as thereby is deſired, notwithſtanding the ſaid *Thomas Heſketh* hath not accompliſhed his full age of 21 years, the ſame being the only cauſe alleged to prevent

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the

the doing thereof, which otherwiſe might be done, without this our ſpecial warrant, in the ordinary courſe of legal proceedings; and therefore we do by theſe preſents aſſent and give full power and authority unto you our ſaid chief juſtice, and the reſt of the juſtices of our ſaid court of common pleas, holden for the ſaid county palatine of *Lancaſter* now being and to the chief juſtice of our ſaid court, and the reſt of the juſtices of the ſaid court for the time being, that you and either and every of you do allow and permit the ſaid petitioner *Thomas Heſketh*, either by himſelf in perſon, or by his able and ſufficient guardian or prochein-amie, to ſuffer a common recovery as tenant or vouchee, and to proceed therein with effect according to the courſe of law in that caſe uſed and provided, any thing whatſoever to the contrary thereof in anywiſe notwithſtanding; and theſe preſents or the enrolment thereof ſhall be unto you our ſaid chief juſtice, and the reſt of the juſtices before named, and to our chief juſtice and other juſtices of our ſaid court for the time being, and to all others whom it may concern, a ſufficient warrant for doing, effecting and allowing of all and ſingular the premiſes, according to our pleaſure herein declared, and the true intent and meaning of theſe preſents. Given under our private ſignet at our court at *Whitehall*, the 31ſt day of *July*, in the 13th year of our reign, and in the year of our lord 1661.

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A recovery with ſingle voucher

Lancaſhire, to wit. It is granted by the court here, that *John Molineux*, eſq. ſhall ſue for *Thomas Heſketh*, eſq. who is within age, as the guardian of the ſaid *Thomas*, againſt *Thomas Lee*, eſq. and *Alexander Rigby*, eſq. in a plea of land.

Count againſt tenant in tail.

Lancaſhire, to wit. *Thomas Lee* and *Alexander Rigby* eſquires, in their proper perſons, demand againſt *Thomas Heſketh* eſq. the manors of R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. and N. W. with the appurtenances, and 323 meſſuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of paſture, 2000 acres of moor, and 2000 acres of furze and heath, with the appurtenances in R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. N. W. H. T. L. P. W. O. P. H. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances as their right of inheritance, and into which the ſaid *Thomas* hath

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not entry until after the diſſeiſin which *Hugh Hunt* thereof unjuſtly and without judgment, hath made to the aforeſaid *Thomas Lee* and *Alexander*, within 30 years now laſt paſt, &c. and whereof they ſay that they themſelves were ſeiſed of the manors and tenements aforeſaid with the appurtenances in their demeſne as of fee and right, in the time of peace, in the time of our lord the now king, by taking the eſplees thereof to the value, &c. and into which, &c. and thereof they bring ſuit, &c.

And the ſaid *Thomas Heſketh*, who is within age, by *John Molineux*, eſq. who is admitted by the court here to ſue for the ſaid *Thomas*, as the guardian of the ſaid *Thomas* in the plea aforeſaid, in his proper perſon comes and defends his right when, &c. and vouches thereof to warranty *Thomas Barton*, who is preſent here in court in his proper perſon, and freely warrants the manors and tenements aforeſaid with the appurtenances to him, &c. And thereupon the ſaid *Thomas Lee* and *Alexander* demand againſt the ſaid *Thomas Barton* tenant by warranty, the manors and tenements aforeſaid with the appurtenances in form aforeſaid, &c. and whereof they ſay that they themſelves were ſeiſed of the manors and tenements aforeſaid with the appurtenances in their demeſne as of fee and right, in time of peace, in the time of our lord the king, by taking the eſplees thereof to the value, &c. and into which, &c. and thereof they bring ſuit, &c.

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who vouches the common vouchee.

And the ſaid *Thomas Barton* tenant by his warranty defends his right when, &c. and ſays that the ſaid *Hugh* did not diſſeiſe the ſaid *Thomas Lee* and *Alexander* of the manors and tenements aforeſaid with the appurtenances, as the ſaid *Thomas Lee* and *Alexander* by their writ and declaration aforeſaid above ſuppoſe, and of this he puts himſelf upon the country, &c. And the ſaid *Thomas Lee* and *Alexander* pray leave to imparl thereto, and they have it, &c. And afterwards the ſaid *Thomas Lee* and *Alexander* come again into court in this ſame ſeſſion in their proper perſons, and the ſaid *Thomas Barton*, although ſolemnly called, doth not come, but has departed in contempt of the court and made default. Therefore it is conſidered that *Thomas Lee* and *Alexander* recover their ſeiſin againſt the ſaid *Thomas Heſketh* of the manors and

tenements

tenements aforeſaid with the appurtenances, and that the ſaid *Thomas Heſketh* have of the land of the ſaid *Thomas Barton* to the value, &c. And the ſaid *Thomas Barton* in mercy, &c. And therefore the ſaid *Thomas Lee* and *Alexander* pray the writ of our lord the now king, to be directed to the ſheriff of the ſaid county, to cauſe them to have full ſeiſin of the manors and tenements aforeſaid with the appurtenances, and it is granted to them returnable here on *Friday* next following in this ſame ſeſſion, &c. At which day come here the ſaid *Thomas Lee* and *Alexander* in their proper perſons, and the ſheriff, to wit, Sir *George Middleton* knt. and bart. returns that he, by virtue of the writ aforeſaid to him directed, on *Thurſday* the 5th day of *September* laſt paſt, cauſed the ſaid *Thomas Lee* and *Alexander* to have full ſeiſin of the manors and tenements aforeſaid with the appurtenances, as by the ſaid writ he was commanded, &c.

Writ of ſeiſin.

Charles the 2d, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Lancaſhire* greeting: Know that *Thomas Lee* and *Alexander Rigby* eſquires, in our court before our juſtices at *Lancaſter*, recovered their ſeiſin againſt *Thomas Heſketh* eſq. of the manors of R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. and N. W. with the appurtenances, and 323 meſſuages, 4 mills, 1000 acres of land, 267 acres of meadow, [91] 1000 acres of paſture, and 2000 acres of moor, and 2000 acres of furze and heath with the appurtenances, in R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. N. W. H. T. L. P. W. O. P. H. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances in your county by our writ of entry *ſur diſſeiſin* in the poſt. And therefore we command you, that without delay you cauſe the ſaid *Thomas Lee* and *Alexander* to have full ſeiſin of the manors and tenements aforeſaid with the appurtenances; and in what manner you ſhall execute this precept you make known to our juſtices at *Lancaſter* on *Friday* next following; and have there this writ. Witneſs *C. Turner* at *Lancaſter*, the firſt day of *September*, in the 23th year of our reign. *Elwes.*

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Anſwer of the ſheriff.

By virtue of this writ to be directed, I have cauſed the within-named *Thomas Lee* and *Alexander* to have full ſeiſin of the manors and tenements within written, on the 5th day of *September*, in the 13th year of the reign of our lord the king within written, as within I am commanded. Sir *George Middleton* knt. and bart. ſheriff.

Aſſignment of errors (poſt. 101. p.)

Afterwards, to wit, on *Wedneſday* next after five weeks of *Eaſter* in this ſame term, before our lord the king at *Weſtminſter*, comes the ſaid *Thomas Heſketh* by *Nicholas Harding* his attorney, and ſays that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this, to wit, that by the record aforeſaid it appears, that the judgment aforeſaid in form aforeſaid given, was given for the ſaid *Thomas Lee* and *Alexander Rigby* againſt the ſaid *Thomas Heſketh*, whereas by the law of this realm of *England*, the ſaid judgment ought to have been given for the ſaid *Thomas Heſketh* againſt the ſaid *Thomas Lee* and *Alexander Rigby*; therefore in that there is manifeſt error.

General error. (poſt. 102. q.)

Special errors that T. H is admitted to *proſecute* by his guardian, though he was *tenant*. (poſt. 101. q.)

There is alſo error in this, that by the ſaid record it appears, that the ſaid *Thomas Heſketh* is admitted by the court to *proſecute* by *John Molineux* his guardian, whereas in truth the ſaid *Thomas Heſketh* was *tenant* in the plea aforeſaid; and therefore in that there is manifeſt error.

No appearance entered on record.

There is alſo error in this, that no appearance is entered upon the ſaid record for the ſaid *Thomas Heſketh* by his guardian, and therefore in that there is manifeſt error.

Nor does it appear that T. H. vouched to warranty the common vouchee.

There is alſo error in this, namely, that it does not appear by the ſaid record, whether the ſaid *Thomas Heſketh* ever appeared and vouched to warranty the ſaid *Thomas Barton* vouchee to warranty mentioned in the ſaid record; but the ſaid appearance, and alſo the vouching to warranty of the ſaid *Thomas Barton*, is altogether uncertain and inſufficient, and therefore in that there is manifeſt error, &c. And the ſaid *Thomas Heſketh* prays the writ of our lord the now king to warn the ſaid *Thomas* and *Alexander* to be before our lord the king, to hear the record and proceedings aforeſaid, and it is granted to him, &c. by which it is commanded to the chancellor of the county palatine of *Lancaſter*, or to his deputy there,

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Scire facias ad audiendum errores. (poſt 101.) r.

there, that he make his mandate to the ſheriff of the county palatine aforeſaid, that by good and lawful men of his bailiwick, he make known to the ſaid *Thomas Lee* and *Alexander Rigby*, that they be before our lord the king in three weeks from the day of the *Holy Trinity* whereſoever, &c. to hear the record and proceedings aforeſaid, if, &c. and further to do and receive what the ſaid court of our ſaid lord the king ſhall conſider of them in this behalf; the ſame day is given to the ſaid *Thomas Heſketh*, &c. At which day before our lord the king at *Weſtminſter* comes the ſaid *Thomas Heſketh* by his attorney aforeſaid; and the chancellor of the county palatine aforeſaid, to wit, Sir *Thomas Ingram* knt. returns that he, by virtue of the writ of our lord the king to him thereof directed, by the writ of our lord the king under the ſeal of the county palatine aforeſaid, had made his mandate to the ſheriff of the ſaid county, as he was commanded; which ſaid ſheriff, to wit, *Thomas Greenhalgh*, eſq. anſwered, that by virtue of the ſaid writ to him directed, he had, by E. B. and J. D., good and lawful men of his bailiwick, cauſed it to be made known to the within named *Thomas Lee* and *Alexander Rigby*, that they be before our lord the king at the day and place within written, to do and receive what the court of our lord the king within written ſhould conſider, as by the ſaid writ to him directed he was commanded. Which ſaid *Thomas Lee* and *Alexander Rigby*, according to the warning to them in that behalf given, come by *Seth Powell* their attorney; whereupon the ſaid *Thomas Heſketh* as before, ſaith, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid there is manifeſt error, by alleging the ſaid errors by him in form aforeſaid alleged; and he prays that the judgment aforeſaid for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing, and that he may be reſtored to all things which he has loſt by occaſion of the ſaid judgment, &c. and that the ſaid *Thomas Lee* and *Alexander Rigby* may rejoin to the errors aforeſaid, and that the court of our lord the king may proceed to examine as well the record and proceedings aforeſaid, as the ſaid matters above aſſigned for error.

And

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Joinder in error.

And the ſaid *Thomas Lee* and *Alexander Rigby* ſay, that there is no error either on the record and proceedings aforeſaid, or in giving the judgment aforeſaid; and they likewiſe pray that the court of our lord the king may proceed to examine as well the record and proceedings aforeſaid, as the matters aforeſaid above aſſigned for error, and that the judgment aforeſaid may in all things be affirmed. But becauſe the court of our lord the king here is not yet adviſed what judgment to give of and concerning the premiſes, a day is therefore given to the parties aforeſaid before our lord the king until three weeks from the day of *Eaſter* wheresoever, &c. to hear their judgment thereon; for that the court of our ſaid lord the king here is not yet adviſed thereof, &c. At which day, before our lord the king at *Weſtminſter* come the parties aforeſaid by their attornies aforeſaid, and thereupon the ſaid *Thomas Heſketh* likewiſe prays another writ of our ſaid lord the king of *ſcire facias*, to be directed to the chancellor of the county palatine of *Lancaſter*, or his deputy there in that behalf, to warn the tenants of all the manors, lands and tenements above mentioned, to be before our lord the king wheresoever, &c. to hear the record and proceſs aforeſaid, and it is likewiſe granted to him, &c.; by which it is commanded to the chancellor of the county palatine of *Lancaſter* aforeſaid, or to his deputy in that behalf, that, by the writ of our lord the king in due manner made under the ſeal of the county palatine aforeſaid, and to be directed to the ſheriff of the ſaid county, he make his mandate to the ſaid ſheriff, that by good, &c. of his bailiwick, he make known to the aforeſaid tenants, that they be before our ſaid lord the king on the octave of St. *Hilary* wheresoever, &c. to hear the record and proceedings aforeſaid, if, &c.; and further, &c. the ſame day is given to the ſaid *Thomas Heſketh*, &c. At which day, before our lord the king at *Weſtminſter* comes the ſaid *Thomas Heſketh* by his attorney aforeſaid; and the ſaid Sir *Thomas Ingram*, chancellor of the county palatine aforeſaid, returns, that he by virtue of the ſaid writ to him in form aforeſaid directed and delivered, by the writ of our lord the king, under the ſeal of the county aforeſaid, had made his mandate to the ſheriff of the ſaid county as he was above commanded; which ſaid ſheriff,

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Plaintiff prays a *ſcire facias* to the tenants.

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ſheriff, to wit, *Chriſtopher Baneſtre* eſq. anſwered him, that by virtue of the ſaid writ to him directed, he had by E. B. I. D. W. H. and R. H. good and lawful men of his bailiwick, cauſed it to be made known to *John Molineux* eſq. and *Lucy* his wife, tenants of the ſaid ſeveral manors of L. C. M. H. cum B. T. cum S. W. and H. with the appurtenances, and of 172 meſſuages, with the appurtenances in L. C. M. H. cum B. T. cum S. W. H. H. H. and P. aforeſaid; and alſo to *Ralph Egerton* gent. tenant of one meſſuage, with the appurtenances in H. cum B.; to *Thomas Harſnepp*, tenant of one meſſuage, with the appurtenances in M.; to *Richard Sands* tenant of one meſſuage with the appurtenances in H.; to *Henry Sutch* tenant of one meſſuage with the appurtenances in H.; to *Egeon Taylor* and *Thomas Walton* tenants of two meſſuages with the appurtenances in H. aforeſaid; to *William Moſſe* tenant of one meſſuage with the appurtenances in L.; to *Henry Nelſon* tenant of one meſſuage with the appurtenances in C. aforeſaid; to *William Bandy* tenant of one meſſuage with the appurtenances in T. cum S. aforeſaid; to *Richard Sands* tenant of one meſſuage with the appurtenances in H.; to *John Barton* tenant of one meſſuage with the appurtenances in P. aforeſaid; to *John Stater* tenant of one meſſuage with the appurtenances in P.; to *Nicholas Maſſom* tenant of one meſſuage with the appurtenances in R. and to *Richard Banniſter* tenant of one meſſuage with the appurtenances in W.; that they be before our ſaid lord the king on the octave of St. *Hilary* whereſoever, &c. to hear the record and proceedings aforeſaid, if it ſhall ſeem expedient to them, and further to do and receive in manner and form as above he was commanded; and that there are no other or more tenants of any manors, lands, or tenements in his bailiwick, to whom he can cauſe it to be made known (1). [94]

And

(1) It has been already obſerved (*ante*, 71. note 4.) that, though a *ſcire facias* againſt the terre-tenants upon a writ of error to reverſe a fine or recovery be diſcretionary, yet, as the conſtant and uniform practice of the court has been to ſue it out, it is not now to be departed from. 3 Mod. 119. *Kingſton* v. *Herbert*; Carth. 111. Earl of *Pembroke*'s caſe. S. C. Skin. 273.

S. P

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Two of the terre-tenants appear and join in error.

And the ſaid *John Molineux* eſq. and *Lucy* his wife, being ſolemnly called on the 4th day of the plea, likewiſe come by *Seth Powell* their attorney; and the ſaid other terre-tenants being likewiſe ſolemnly called on the 4th day of the plea, do not come; whereupon the ſaid *Thomas Heſketh*, as before, ſays, that in the record and proceedings aforeſaid, and alſo in

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S. P. 1 Burr. 359, 360. *Hall* v. *Woodcock*. Ibid. 412. *Sheepſhanks* v. *Lucas*. And in Dy. 321. a. which was a writ of error in the king's bench to reverſe a fine levied in *Cheſter*, it is ſaid, that ſome of the judges of both benches thought, that the moſt perfect and ſure way would be, to award a *ſcire facias* againſt the terre-tenant, before the court proceeded to the examination of the errors: for perhaps he may have ſomething to plead in bar of the writ of error, ſuch as a releaſe and the like, which would relieve the court from the neceſſity of examining the errors at all. And if they ſhould be of opinion that the judgment ought to be reverſed againſt the party or privy, ſtill the plaintiff cannot be reſtored to all that he has loſt, until the terre-tenant be made privy by a *ſcire facias*. For if he be otherwiſe ouſted, he may have an aſſize, and beſides, it would be diſgraceful to the court, if it were to adjudge the plaintiff to be reſtored, and yet not be able to execute their judgment until the terre-tenant were made privy; and therefore, agreeably to this opinion, a *ſcire facias* was afterwards awarded againſt the terre-tenant, and he was returned warned. See Cro. Eliz. 739. *Holland* v. *Dauntzey*. Moor. 622. *Holland* v. *Jackſon*.

By ſtatute 23 Eliz. c. 3. ſ. 2. it is enacted that no recovery ſhall be reverſed for razure, interlining, miſentering of a warrant of attorney, or not returning of the ſheriff, or other want of form in words, and not in matter of ſubſtance. And by ſtatute 10 and 11 W. 3. c. 14. it is enacted, that no fine, or common recovery, ſhall be reverſed, or avoided for any error, or defect therein, unleſs the writ of error, or ſuit for reverſing ſuch fine, or recovery, be brought and proſecuted with effect within 20 years after ſuch fine levied, or recovery ſuffered. And by the 2d ſection, the rights of infants, femes-covert, perſons *non compos*, in priſon, or beyond ſea, are ſaved, ſo as they bring their writ of error within 5 years after their diſabilities are removed.

It has been holden, that by this ſtatute a writ of error muſt be brought within 20 years *after the recovery has been ſuffered*, and not within 20 years *after the title has accrued*; for ſuffering the recovery is the time from which the 20 years are counted. 2 Str. 1257. *Lloyd* v. *Vaughan*.

But ſometimes the court of common pleas will upon application order a common recovery to be amended: for, as it is become now a common aſſurance, it is much favoured, and the court will always amend it, whenever it can be done conſiſtently with the rules of law, and provided there be ſomething to amend it by. Willes's Rep. 563. *Wynne* v. *The-*

in giving the judgment aforeſaid there is manifeſt error, by alleging the errors aforeſaid above in form aforeſaid alleged; and he prays that the judgment aforeſaid for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing, and that he may be reſtored to all things which he has loſt by occaſion of the ſaid judgment, &c.

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And

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v. *Thomas*. And length of time is not of itſelf an anſwer to the application, for recoveries have been frequently amended forty years or more after they were ſuffered. 7 Mod. 497. *Wynne* v. *Wynne*. But the court requires the beſt evidence that can be adduced to ſhew that the defect or omiſſion, which is ſought to be ſupplied, originated in miſtake, and that the amendment propoſed is agreeable to the intention of the parties when the recovery was ſuffered. Therefore if parcels, or a pariſh, or a vill, are omitted in a recovery, or there is a miſtake in the deſcription of the premiſes, or in the name of the parties, the court will not allow an amendment of theſe particulars merely on an affidavit of the facts, becauſe that is not the beſt evidence; but the deed to lead the uſes of the recovery muſt alſo be produced; for that is the beſt evidence of the intention of the parties: and it muſt appear *on the face of the deed*, that there is ſufficient ground for the amendment. 1 H. Black. 73. *Pearſon* v. *Pearſon*. Thus, where the deed to lead the uſes deſcribed the parcels to be ſituate "in the lordſhip "of *Myton* in the county of *York*, or in "the town and county of *Hull*, lately "purchaſed of *Thomas Yates*;" and it was verified by affidavit that the lands intended to paſs were purchaſed of *Thomas Yates*, being in the townſhip of *Myton* in the town and county of *Kingſton upon Hull*; but the recovery was, of lands "in the town of *Kingſton* "*upon Hull*:" it was ordered to be amended by inſerting the words "*in* "*Myton*," and the words "*and county*," and ſo making the deſcription of the lands to be "in *Myton* in the town and "county of *Kingſton upon Hull*," though the recovery had been ſuffered two and twenty years before, and the vouchee was then dead. 2 Black. Rep. 1065. *Watſon* v. *Cox*. So where the deed to lead the uſes mentioned "all "the vouchee's lands in *Aldenham*, *or* "*elſewhere*, in the county of *Kent*, in "the occupation of *Robert Goddard*." *Robert Goddard* rented one entire farm of the vouchee, all ſworn to be intended to paſs by the recovery, being principally in the pariſh of *Aldenham*, but part thereof lay in the pariſh of *Merſham*, which was not known to the parties when the recovery was ſuffered. The court, after taking a day to conſider of it, allowed the recovery to be amended, by inſerting the word *Merſham*. 2 Black. Rep. 747. *Henzel* v. *Lodge*. 3 Wilſ. 154. S. C. In like manner the court has enlarged the number of acres in a recovery by allowing the writ of entry, mittimus, tranſcript, and recovery, to be amended by the deed to lead the uſes, by inſerting *fifty* acres inſtead of *thirty*, being the

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And becauſe the court of our ſaid lord the king is not yet adviſed what judgment to give of and concerning the premiſes, a further day is therefore given to the parties aforeſaid, before our lord the king, until three weeks from the day of *Eaſter*, whereſoever, &c. to hear their judgment of and concerning the premiſes; for that the court of our ſaid lord the

the number of acres ſworn to be intended to paſs, and the deed comprehending a much larger number. It is true Lord chief juſtice *Eyre* felt ſome difficulty in allowing the miſtake to be amended in the writ of entry on the authority of Lord *Pembroke*'s caſe. 1 Salk. 52; but Mr. Juſtice *Heath* ſaid that during the whole time he had ſat on the bench, it had been the conſtant practice to amend recoveries by the deed to lead the uſes. 1 Boſ. & Pull. 137. *Croſs* v. *Grey*. However, to prevent any fraud on the alienation office by inſerting only a few acres in the recovery at firſt, and ſo praying but a ſmall fine, and afterwards applying to the court for leave to inſert a greater number, the court, before they allow the amendment, take care that the parties ſhall duly compound at the alienation office for the additional number of acres. So the writ of entry, and ſubſequent proceedings in a recovery have been allowed to be amended, by inſerting the word, all and all manner of *tithes* whatſoever yearly ariſing from and out of the ſaid premiſes therein, the deed leading the uſes comprehending all the lands, and *hereditaments* which the vouchee was ſeiſed of in tail by virtue of the will of A. B., and it being ſworn that the tithes were parcel of the premiſes ſo deviſed, and were intended to be compriſed in the recovery. 2 Boſ. & Pull. 578. *Dowſe* v. *Lloyd*, and 580. note (a.) *Milbanke* v. *Jolliffe*. So where a recovery was agreed to be ſuffered of lands in N. L. and M., but N. was totally omitted, the recovery was allowed to be amended by the deed to lead the uſes. Pig. 172. So a recovery ſuffered nine years before was ordered to be amended, by putting the word "Trull," the name of a vill, into its proper place, according to the deed of uſes. Trull had by miſtake been put into the recovery as an advowſon, not as a vill where lands lay. And the court ſaid that the principle upon which they went was the ſtatute 8 H. 6. c. 12. to amend the miſpriſion of the clerk. A *præcipe* is the curſitor's inſtruction for an original writ; a deed of uſes is the clerk's inſtruction for a recovery. This *præcipe* and this deed are the things to amend by. Barnes, 21. *Loggin* v. *Rawlins*. So the Chriſtian name of the vouchee has been altered in a recovery by the deed to lead the uſes of it. 2 Black. Rep. 1230. *Mayre* v. *Coulthard*. So where A. was demandant in the recovery, and B. tenant, but by the deed to lead the uſes, B. was to have been demandant, and A. tenant; the names were tranſpoſed accordingly. Barnes 24. *Lord* v. *Briſcoe*. The court will alſo amend any informality in the entering of the judgment in a recovery, it being their own act; as by ſtriking out the words, "it is

adjudged"

the king here is not yet adviſed thereof. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid by their attornies aforeſaid, whereupon as well the record and proceedings aforeſaid and the judgment given thereupon, as the matters aforeſaid above for error aſſigned, being ſeen, and by the court of our lord the king here more fully underſtood, and

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Judgment affirmed.

"adjudged," and inſerting the words "it is conſidered." Barnes 23. *Ring* v. *Bold*. Ibid. 22. *Tarrant* v. *Randal*. Amendments are alſo allowed in the writ of ſeiſin, and the return thereof. Thus where a writ of ſeiſin was rightly directed to the ſheriffs of the city of *York*, but not returned in the name of any ſheriff, though a miſtaken return in the ſingular, inſtead of the plural number, was indorſed on the writ; the prayer of ſeiſin, and return of the writ, were ordered to be firſt amended, and then the roll and exemplification accordingly. Barnes 23. *Witton* v. *Eaſt*. So the return of the writ of ſeiſin was amended in the year of the king's reign. 2 Wilſ. 2. *Watſon* v. *Lockley*. So where a recovery is erroneous, becauſe no writ of ſeiſin is awarded, nor the judgment executed by a writ of ſeiſin returned on the roll, the court of common pleas will, after a writ of error is brought to reverſe the recovery for that error, rectify the defect in the record, by ordering a writ of ſeiſin to be awarded on the roll, and return executed; for no writ of ſeiſin is ever in fact executed. 5 Term Rep. 179, 180. *Goodright* v. *Rigby*, *per* Lord *Kenyon*.

But no amendment will be allowed in the deſcription of the eſtates comprehended in a recovery, where the recovery, as it ſtands, has lands of the vouchee to operate upon. As where a recovery was ſuffered of premiſes in the county of the city of *Litchfield*, and by the deed to lead the uſes it appeared that the greater part of the premiſes intended to paſs by the recovery were in the county of *Stafford*, but a ſmall part of them alſo lay in the county of the city of *Litchfield*; the court would not ſuffer the recovery to be amended by ſtriking out the words "city of *Litchfield*," and inſerting the words "county of "*Stafford*;" for this would in effect be annulling a valid recovery in the city of *Litchfield* which had operated upon lands there, and ſubſtituting in its ſtead a recovery in the county of *Stafford*. 2 Black. Rep. 874. *Allen* v. *Baldwin*. Whenever there is a miſtake either in the teſte or return of the writ of entry, owing to the *miſpriſion* or *negligence* of the clerk, it is amendable by ſtatute 8 H. 6. c. 12.; but where the miſtake is occaſioned by the *neſcience* or *ignorance* of the clerk, it is not amendable by that ſtatute: this diſtinction is warranted by *Blackamore's* caſe. 8 Rep. 159. b. 160. a. Therefore where the *teſte* is void, as when it is made on a *Sunday*, or in vacation time, it is amendable as the plain miſpriſion of the clerk; but where there is an impoſſible *teſte*, as if the writ of entry bears *teſte* after the return, the *teſte* is not amendable; though *Gage's* caſe, 5 Rep. 45. b. is to the contrary; but

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and diligently examined, because it appears to the court of our lord the king here, that the said record is in nothing vitious and defective, and that there is no error in the said record; therefore it is considered that the judgment aforesaid be in all things affirmed, and stand in full force and effect, the several causes and matters for errors assigned notwithstanding, &c.

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but that case has often been denied. 2 Ld Raym 1066 *Queen* v. *Tuchin*. 1 Salk. 52 Lord *Pembroke* v. Lord *Jefferey*s; in which last case a writ of covenant to levy a fine was tested six months after the *dedimus* for the caption, but it did not appear whether the *teste* was before the return or after; and Lord *Holt* certified the opinion of the judges in the house of lords, that the writ was not amendable in that instance. However, at all events, neither the *teste*, nor return of the writ of entry is amendable, where it is not the misprision of the clerk, unless there is something to amend it by. Willes's Rep. 563. *Wynne* v. *Thomas*.

Case 15.

Hesketh *versus* Lee & al'.

Pasch. 21 Car II. Regis. Rot. 408.

S. C. 1 Sid. 445. 1 Vent 73. 2 Keb 627. 2 Mod. 48

If a guardian be admitted *to sue* for an infant tenant or defendant, it is not any error.

ERROR by *Hesketh* against *Lee* and *Rigby* to reverse a judgment in a common recovery in the county palatine of *Lancaster*, in which *Lee* and *Rigby* were demandants against *Hesketh* then an infant tenant, who appeared by guardian and vouched the common vouchee, upon which the recovery was had; and the error insisted upon was, that it appears by the record that the now plaintiff, who was then tenant, was an infant within the age of 21 years. And the entry of his admission by his guardian is in this manner, namely, "It is granted by the court here that *John Molineux shall sue* for *Thomas Hesketh*, esq. who is within age, as guardian of the said *Thomas*, against *Thomas Lee*, esq. and *Alexander Rigby*, esq. in a plea of land." And in the body of the common recovery immediately after the end of the count, the entry is in this manner, namely, "And the said *Thomas Hesketh*, who is within age, by *John Molineux*, esq. who is admitted

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by

by the court *to ſue* for the ſaid *Thomas* as the guardian of the ſaid *Thomas* in the plea aforeſaid, in his proper perſon comes and defends his right when, &c. and vouchers thereof to warranty, &c." Which was ſtrongly urged by *Weſton* of *Gray's Inn* to be error, for it ought to have been, that the guardian was admitted *to defend* for the infant tenant, and not *to ſue* for him, becauſe the infant was tenant and ſo defendant, and therefore did not *proſecute* the ſuit, but was proſecuted, wherefore he ought to have a guardian to defend him; and there was no neceſſity to have any perſon to proſecute or ſue, where there was no ſuit on the part of the infant to be followed or proſecuted. And he ſaid this entry is agreeable to, and conſiſtent with law, where the infant was demandant, but not conſonant to law, or according to precedents, where the infant was tenant as here. And he further ſaid that though common recoveries, being amicable actions for common aſſurances, are much favoured in law, yet they are real actions, and are of the ſame nature with an adverſary action upon a writ of entry *ſur diſſeiſin en le poſt*, and therefore ought to be guided by the ſame rules that govern them (*b*). And he cited the caſe of *Simpſon* v. *Jackſon* (*c*), where an infant defendant was admitted by prochein amy *ad proſequendum* in an action of ejectment, and it was adjudged to be error, and therefore the judgment was reverſed; which in effect is the ſame caſe with the caſe at bar. He alſo took another exception, that upon the record the infant was admitted by guardian, and yet the infant appeared *in proper perſon*, whereas he ought to have appeared by guardian. For the entry in the body of the record is, that the infant, "by *John Molineux*, eſq. who is admitted by the court here to ſue for the ſaid *Thomas*, (namely the infant,) as guardian of the ſaid *Thomas*, (namely the infant,) in the plea aforeſaid, *in his proper perſon* comes, &c." as before: So it ſays that the infant came in his proper perſon, though he was admitted by guardian, and therefore the judgment erroneous.

(*b*) Ante, 42. note (7).
(*c*) Cro. Jac. 640.

Sed non allocatur; for by the court as to the firſt exception, the admiſſion by guardian to ſue, &c. was good enough becauſe the words "to ſue" were ſufficiently ſignificant of a

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defendant, for "to ſue" is nothing more than "to take care of, or take upon one, the defence or tuition of the cauſe for the infant, or on his behalf." And theſe words "to ſue" may be applied indifferently either to the demandant or plaintiff, or to the tenant or defendant, for the ſuit of one party
[96] or of the other muſt be followed. And the words "to ſue" not only ſignify "to proſecute," but alſo "to defend," or to do ſomething which the law requires for the better proſecution or defence of the cauſe in which the guardian is admitted. And as to the ſecond exception, the court ſaid it is plain by the record that the infant appeared by his guardian, and then the words, "in his proper perſon" are only ſuperfluous and idle, and will not hurt the record which was perfect before, eſpecially in a common recovery which is ſo greatly favoured in law. But the court ſaid that the words "in his proper perſon" may well ſtand with the precedent matter in good ſenſe; for the ſenſe is, that the infant comes by his guardian in his proper perſon, that is, that the infant comes by his guardian, which guardian *was in his proper perſon*, and ſo the words "in his proper perſon" relate to the guardian and not to the infant, as *Weſton* would have it; and by this expoſition the whole ſentence ſtands well together, and is all good ſenſe without ſtriking out, or rejecting any word: and the beſt conſtruction is to be made to ſupport a judgment. And for theſe reaſons the judgment was affirmed by the whole court (2).

(2) It was long doubted, whether a common recovery ſuffered by an infant by guardian was good; and, in 10 Rep. 43. a. *Mary Portington*'s caſe, the better opinion ſeems to have been that it was erroneous; but it now appears to be ſettled that if an infant appear by guardian and vouch the common vouchee, and ſo ſuffer a recovery, it cannot be reverſed by error. And the reaſon aſſigned is, that if the recovery be to the prejudice of the infant, he may have remedy againſt his guardian for it. Cro. Car. 307. *Earl of Newport* v. *Mildmay*. S. C. Sir W. Jones, 318. S. P. Hob. 196. *Elount*'s caſe. 1. Roll. Abr. 731. (G.) pl. 1. 1 Sid. 321. *Raby* v. *Robinſon*. Pig. 64. 2 Bac. Abr. 543. 3 Bac. Abr. 135. Cro. Eliz. 471. *Stapleton*'s caſe, to which may be added the preſent caſe. Therefore when an infant intended to ſuffer a common recovery, the practice formerly was for him and his guardian to petition the king

king to grant letters under the privy ſeal, as in this caſe, to the judges of the court where the recovery was to be ſuffered, directing them to permit ſuch infant to ſuffer a common recovery. But it was ſtill in the diſcretion of the judges, whether they would permit the infant to ſuffer it or not, in the exerciſe of which they were governed by the circumſtances of the caſe. If upon examination it was either found to be neceſſary, or for the advantage of the infant, that he ſhould ſuffer a common recovery, the judges admitted perſons of known integrity and fortune to appear as guardians to the infant, and to ſuffer a recovery for him in court Hob. 196. *Blount*'s caſe. 1 Vern. 461. Sir *H. Mackworth*'s caſe. But if the reaſons for the application did not appear to the judges to be ſufficient, they would not permit the recovery to be ſuffered. 1 Ld. Raym. 113. *Hulbert* v. *Watts*. 2 Salk. 567. Sir *John St. Alban*'s caſe. But common recoveries ſuffered by privy ſeal are now diſuſed, and private acts of parliament univerſally ſubſtituted in their ſtead. When an infant is permitted to ſuffer a recovery with double voucher, which is now the common courſe, he muſt make a tenant to the præcipe by *feoffment*, and give livery of ſeiſin *in perſon*, by which means the feoffment is only *voidable*, whereas, if the infant appointed an attorney to give livery of ſeiſin for him, the feoffment would be abſolutely *void*. Perk. ſ. 12. 13. 3 Burr. 1804. *Zouch* v. *Parſons*. Or he may make a tenant to the præcipe *by fine*. Fig. 65.

If an infant ſuffer a common recovery *in perſon* it is erroneous, and he may reverſe it by a writ of error; but the writ muſt be brought in this caſe, as in that of a fine, *during his minority*: for the fact is to be tried by the inſpection of the judges; but after his full age it is too late to reverſe it by writ of error, or otherwiſe howſoever; for the recovery or fine then becomes obligatory and unavoidable for ever. Co. Litt. 380. b. 1 Sid. 321. *Raby* v. *Robinſon*. S. C. 1 Lev. 142. Pig. 166. 1 Mod. 46. *Heſkett* v. *Lee*. 2 Bac. Abr. 543. 3 Bac. Abr. 135. So if an infant ſuffer a recovery, or levy a fine, he is by law enabled *to lead or declare the uſes thereof*: and if he do not reverſe the recovery or fine during his non-age, the declaration of uſes will ſtand good for ever; for, though the deed to lead or declare the uſes of the fine or recovery be a matter *in pais*, and all ſuch acts an infant may in general avoid at any time after his full age, if he do not conſent, yet being made in purſuance of the recovery or fine, and being a part thereof, it ſhall likewiſe ſtand as long as the fine or recovery remain in force as incident thereto. 2 Rep. 58. a. *Bethwick*'s caſe. 10 Rep. 42. b. *Mary Portington*'s caſe. Hob. 234. Lord *Darcy* v. *Aſkwith*. 3 Atk. 710, 711. *Hearle* v. *Greenbank*. 1 Ves. 304, 305. S. C. 3 Bac. Abr. 135. 1 Roll. Abr. 730. (F.) pl. 3. But if an infant ſuffers a common recovery in which he appears *by attorney*, he may reverſe it at any time after he has attained his full age, becauſe it may be tried by a jury, whether he was an infant or not when he appointed an attorney. For an infant is not preſumed to have diſcretion enough to chooſe a proper perſon to be his attorney, and therefore on account of the imbecility of his underſtanding, the law has put it out of his power to hurt himſelf; for if he be prejudiced by the recovery, he has not any remedy againſt his attorney as he may have

[illegible] his guardian; and therefore his [illegible]ointment of an attorney is void. 2 Roll. 321, 322. *Raby* v. *Robinſon*. 1 Roll. Abr. 573. pl. 8. 1 Roll. Abr. 755. pl. 6. Bridg. 73. *Holland* v. *Jackſon*. Arg. 5 Mod. 109. *Stokes* v. *Oliver*.

Caſe 15.

Cheſter *verſus* Willan.

Trin. 21. Car. II. Regis. Rot. 498.

[illegible] B. R. Keb. [illegible]. 1. Vent. 78. 2 T. Raym. [illegible]. 1. [illegible]. 452 S. C. cited 24 Vin. [illegible]. 8. 19 Vin. 313 [illegible] there are three [illegible]tenants for [illegible]s, and one of [illegible]m by his deed [illegible]ts all his [illegible]ht to the lands [illegible]ointure to [illegible]nother of the [illegible]tenants, the [illegible]d is ſufficient [illegible] paſs the eſtate [illegible] him who [illegible]made the deed [illegible] the other.

ACTION upon the caſe upon a ſpecial iſſue directed out of chancery, and on a ſpecial verdict found at the aſſizes, the caſe was this. Three jointenants for life, and one of them ſeals and delivers a deed to another of the jointenants, in which it is expreſſed, that he "granted, bargained, ſold, aſſigned, ſet-over and confirmed," to the other, all the right, eſtate, title, intereſt, claim and demand of the grantor, of and to the lands holden in jointure. And the queſtion upon this ſpecial verdict was, whether this deed was ſufficient to paſs the part or ſhare of the jointenant who made the deed, to the other to whom the deed was made or not. And it was adjudged clearly without argument that it was. And *Jones* for the defendant would have ſpoken to it, but the court interrupted him, and ſaid it was ſo clear, that there could be no queſtion about it; and therefore judgment was given for the plaintiff who claimed under the deed.

[illegible] legal [illegible]opera[illegible]n of the word [illegible]grant."

Note; the word "grant" is of general extent, and may amount to a grant, feoffment, gift, leaſe, releaſe, confirmation, or ſurrender. Litt. ſ. 531. Co. Litt. 301. b. 302. a. (1).

Note;

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(1) And it is in the election of the party to uſe it to whichever of theſe purpoſes he pleaſes. Co. Litt. 301. b. The chief intent of the parties is *to paſs* the eſtate, and *the method* of doing it ought to be ſubſervient to that end: and though the intent of the grantor is to be regarded *as to what eſtate* is to paſs, *and to whom*, yet it is not to be regarded as to the *manner* of paſſing it, for of that he is ſuppoſed to be ignorant. And it is an eſtabliſhed rule, that a deed ſhall never be laid aſide as void, if by any conſtruction it can be made good. Hob. 277. *Earl of Clanrickard*'s caſe. Shep. Touchſtone, 82, 83.

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Note alſo; that it was ſaid by the chief juſtice, that though the jury have found, that he *granted*, yet the court would adjudge that *he releaſed*, which is the proper conveyance for one jointenant to paſs his eſtate to the other. But if the party in pleading had *pleaded* that he granted, the plea would be bad, for every one muſt order his plea according to the

A *releaſe* is the proper conveyance for one jointenant to paſs his eſtate to the other.

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83. Therefore where a man ſeiſed in fee of a rent granted it by deed to one who was his kinſman, and there was an attornment to the grant, but it was made by a perſon who was not the real tenant of the land, and therefore void; though the intent appeared that the deed ſhould *operate as a grant at common law with an attornment*, yet ſince it could not paſs that way, it was adjudged that the grant being made to a relation *ſhould operate as a covenant to ſtand ſeiſed*. *Sanders* v. *Savile*, cited in 3 Lev. 372. So where a man by deed *gives and grants* land to another, and a letter of attorney to make livery is indorſed upon the deed, but no livery happens to be made; yet if this grant be made to a relation, *it ſhall operate as a covenant to ſtand ſeiſed*; though the letter of attorney, indorſed on the deed for the making of livery, ſhews the plain intent of the deed and of the parties to have been, that the land ſhould paſs by feoffment and livery. 3 Lev. 372. *Oſman* v. *Sheaf*. S. C. Carth. 307. And where a father ſeiſed in fee made a deed to his daughter enrolled within ſix months, by which, in conſideration of natural love, augmentation of her portion, and the preferment of her in marriage, and other good and valuable conſiderations, he gave, granted, bargained, and ſold, aliened, enfeoffed and confirmed unto the daughter and her heirs the ſaid lands, and there was a covenant that after due execution, &c. ſhe ſhould quietly enjoy, and alſo a clauſe of warranty, but there was *no money paid*, or any other conſideration but what was expreſſed in the deed; it was held that though the deed could not enure as *a bargain and ſale*, no *money* having paſſed between them, yet it ſhould operate *as a covenant to ſtand ſeiſed*. 1. Vent. 137. *Croſſing* v. *Scudamore*. And where a father, ſeiſed in fee of a rent, by indenture, in conſideration of affection, and 5*l.* paid, gave, granted, aſſigned, and transferred the rent to his ſon and his heirs; it was held, that there being two conſiderations expreſſed, affection and money, the deed might operate as a bargain and ſale if enrolled, or as a covenant to ſtand ſeiſed. 3 Lev. 291. *Baker* v. *Lade* S. C. 4 Mod. 150. Sty. 204. *Wats* v. *Fix* 7 Rep. 40. b. *Bedell*'s caſe. 2 Roll. Abr. 786. (O.) pl. 1. *Tebbe* v. *Popplethwayte*. So where lands are granted to a man and his heirs with a general warranty againſt all perſons whatſoever, and no livery, or a void livery, is made; ſtill if this grant be made to a relation, it ſhall operate *as a covenant to ſtand ſeiſed*; though the inſerting of the warranty ſhews the intent to have been, that the lands ſhould paſs by way of *feoffment*, in which caſe the feoffees, if

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(b) Sharp v. Sharp.

the rules of law (2); but it is otherwise of a *verdict*, because it is the saying of laymen: See Cro. Eliz. (*b*) 482. S. C. 6 Rep. 26. where the jury found expressly that J. S. demised for life, but found there was no livery, the court adjudged it was no lease, notwithstanding the former precise words of the verdict, &c. (3)

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impleaded, might vouch upon the warranty: whereas it operating by way of use, and a covenant to stand seised, the grantee is in the *post*. and cannot vouch. 1 P. Will. 163. *Tomlinson* v. *Dighton*. *Arg.* And where G. S. being seised in fee, in consideration of a marriage to be had between him and A. S., by indenture between him of the one part, and the said A. S. and W. S. of the other part, did give, grant, enfeoff, aliene and confirm the lands to A. S. and W. S. and their assigns, to hold to A. S for life, remainder to the heirs of her body begotten by the said G. S., the marriage took effect; it was resolved by the whole court that, though the deed could not operate as a bargain and sale, because there was no money consideration, nor as a release because there was no lease for a year, nor as a deed of confirmation because the grantees were neither of them in possession, nor as a feoffment because there was no livery of seisin, and though it seemed to be the intent of the parties that the deed should operate as a common law conveyance, *yet it should operate as a covenant to stand seised*, whereby an estate in special tail was clearly in A. S; and G. S. had only an estate for life by implication with a reversion in fee. 2. Wils 22. *Doe* v. *Assignees* of *Simpson*. 5 C. Willes's Rep. 673. So in the case of *Roe* v. *Tranmarr*, Willes's Rep. 62. S. C. 2 Wils. 75, where T. K. being seised in fee of certain premises, by lease and release in consideration of natural love to his brother C. K. and of 100*l*. *granted*, released and confirmed to the said C. K. the said premises *after the death* of him the said T. K. to hold to the said C. K. and the heirs of his body, and after their decease to J. W. eldest son of his the grantor's well beloved uncle J. W. and his heirs and assigns, to the only proper use of the said J. W. the younger his executors, administrators, or assigns for ever, the said J. W. the younger paying to the child or children of his the grantor's brother S. K. 200*l*., and for want of such children to other nephews and nieces therein mentioned, and for want of such children the estate was to be free from the payment of the sum of 200*l*.: the release contained covenants from the grantor that he was seised in fee; and that it should be lawful for C. K. or J. W. the younger after his the grantor's death, peaceably and quietly to hold &c and it was thereby covenanted, *granted* and agreed by and between the said parties, that all fines, recoveries and other assurances of the said premises already levied, suffered and executed by and between the said parties should enure to and for the only use and behoof of C. K. and the heirs of his body, and for want of such issue to the use of J. W. the younger, his heirs and assigns for ever. At the

time

time of executing the deeds C. K. paid 20l. part of the conſideration in money, and gave his note for the remainder; and a receipt was ſigned by T. K. for the whole ſum. T. K. continued ſeiſed until his death. C. died without iſſue. It was unanimouſly reſolved, that though the deed would not operate as a releaſe, becauſe it granted a freehold in future, which cannot by law be done, yet the deed of releaſe operated *as a covenant to ſtand ſeiſed*, to the uſe of J. W.; that all the particular rules, that have been laid down with reſpect to covenants to ſtand ſeiſed, concurred in that caſe; for there was 1. a deed. 2. words ſufficient to make a covenant; there being not only the word *grant*, which has been often conſtrued as a word of covenant, but the grantor likewiſe expreſsly covenanted in two places in the deed that the eſtate ſhould go to J. W. in ſuch manner as he had granted it. 3. The grantor was actually ſeiſed at the time of the grant. 4. The intent of the grantor was plain that J. W. ſhould have the eſtate after the death of C. K. without iſſue, for it is ſo ſaid in expreſs words in three places in the deed: and laſtly, there was a proper conſideration to raiſe the uſe; for J. W. is called in the deed eldeſt ſon *of his well beloved uncle* J. W.; and indeed if it were not ſo *ſaid* in the deed, his relation to the grantor might be averred and proved according to the caſe of *Goodtitle* v. *Pitto*. 2 Str. 934, 935. and ſeveral caſes there cited out of Lord *Coke*'s reports. S. P. 7 Bro. Parl. Caſ. 70. *Filmer* v. *Gott*. 3 Term Rep. 474. *Rex* v. *Inhabitants of Scammonden*, and ſee the caſe of *Woolly* v. *Pickard*. 1 Saund. 236. c. note (9.) and the court ſeemed to doubt the authority of *Hore* v. *Dix*, 1 Sid. 25. and *Samon* v. *Jones*, 2 Vent. 318. which are in truth overuled by this caſe. See further 1 Lutw. 789. *Sleigh* v. *Metham*. 1 Mod 175, 176. *Scudamore* v. *Croſſing*. S. C. 2 Lev. 9. ibid. 213. *Walker* v. *Hall*. Carth. 38, 39. *Harriſon* v. *Auſtin*. 2 Vez. 252. *Rigden* v. *Vallier*. Cowp. 599, 600. *Goodtitle* v. *Bailey*. Upon theſe caſes the obſervation of Levinz (3 Lev. 378.) appears to be very proper, "that the judges of late "yeare have had a greater conſideration "for the *paſſing* of the eſtate, which is "the *ſubſtance* of the deed, than the "*manner* how, which is the *ſhadow*."

(2) So in 1 Vent. 109. *Monnington* v. *William*, it was ſaid by *Twyſden* J. that where a man in pleading ſets forth his title by conveyance, in which are the words give, grant, releaſe, confirm, bargain, ſell, &c. he muſt expreſs to which of them he will uſe it. S. P. Co. Litt. 301. b. And in *Oſmere* v. *Sheaſe*. Carth. 308. where the court being of opinion that the grant of a rent by deed under the circumſtances operated as a covenant to ſtand ſeiſed, ſaid, that the defendant had done well in *pleading* it as a conveyance by way of *covenant to ſtand ſeiſed*; for if he had pleaded it as *a grant of the rent*, it would have been void. So where in replevin, the defendant avowed for rent, and pleaded a grant of a rent-charge to another, and brought it down by ſeveral meſne conveyances to the father of the defendant in fee, and the father being ſo ſeiſed, by indenture in conſideration of natural love and affection to his ſon the defendant, and of 5l. paid by him, gave, granted, aſſigned and tranſferred the rent to the defendant in fee, "which ſaid grant, "there being no attornment or other "execution had thereon, except only "the

the ſealing and delivery of the deed, "operated by way of covenant to "ſtand ſeiſed to the uſe of the defend-"ant; whereby and by force of the "ſtatute of transferring uſes into poſ-"ſeſſion," the defendant was ſeiſed, and avowed for ſo much rent in arrear: upon which the plaintiff demurred; and it was reſolved by the whole court, that pleading that "no attornment, or any "other execution had thereon," and ſo pleading the ſpecial matter, and leaving the determination of the law to the court, was impertinent and idle. 2. It was reſolved by *Powell*, *Rokeſby* and *Ventris* juſtices, that pleading in the words of the deed, "that he gave, "granted," &c. was ſufficient and the court would conſtrue them according to their legal operation: but they agreed that the defendant might have pleaded this conveyance *as a covenant to ſtand ſeiſed* of the rent to him and his heirs, which they ſaid, would have been the more neat pleading: *Pollexfen* C. J. however held the contrary, and that pleading in the words of the deed was altogether bad, and the defendant ought to have pleaded it at his peril according as he intended to uſe it, namely, that his father *covenanted to ſtand ſeiſed to the defendant and his heirs*; and he reſembled it to the caſe where the words "give, grant, releaſe and "confirm," are in a deed, the party who pleads it muſt rely upon one of them only; and becauſe it was not ſo done in this caſe, he was of opinion that judgment ought to be given for the defendant: upon which a writ of error was brought into the K. B. and the judgment was reverſed for that cauſe only, in not pleading according to what *Pollexfen* had held. 3 Lev. 291. *Baker* v. *Lade*. S. C. 4 Mod. 149. Carth. 253. Skin. 315. 2 Vent. 149. 1 Lutw. 570. *Chaloner* v. *Davis*. See Com. Dig. *Pleader*. (C. 37.) And if the deed be by the words "*dedi* and "*conceſſi*, &c." yet if it operates as a bargain and ſale, it ought to be ſo pleaded. Cro. Eliz. 166. *Taylor* v. *Vale*. See alſo 1 Ld. Raym. 403, 404. *Chaloner* v. *Davis*.

(3) So if a jury by their verdict take upon themſelves to collect the contents of a deed, and yet by the ſame verdict find the deed *in hæc verba*, the court will not regard the collection they have made of the ſubſtance of the deed, but the deed itſelf. Vaug. 77. *Rowe* v. *Huntingdon*. Cro. Eliz. 515.

Caſe 17.

Jaques *verſus* Ceſar.

Paſch. 22 Car. II. Regis. Rot. 752.

Writ of error.

OUR lord the king has ſent, to his truſty and well-beloved Sir *John Vaughan* knt. his chief juſtice of his bench, his writ cloſe in theſe words, to wit: *Charles* the Second, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to our truſty and well-beloved Sir

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John Vaughan knt. our chief-juſtice of our bench, greeting: Becauſe in the record and proceedings, and alſo in the giving of judgment, in a plaint which was in our court before you and your companions, our juſtices of the bench, by our writ between *Auguſtin Ceſar* doctor of phyſick, and *Robert Jaques* late of the city of *Canterbury*, in the county of the city of *Canterbury* eſq. late ſheriff of the ſaid county, of a plea of debt of 55l. 10s. which the ſaid *Auguſtin* demanded of the ſaid *Robert*, as it is ſaid, manifeſt error has intervened, to the great damage of the ſaid *Robert*, as by his complaint we are informed: We being willing that the error, if any there be, ſhould in due manner be corrected, and full and ſpeedy juſtice done to the parties aforeſaid in this behalf, do command you, that, if judgment be thereupon given, then you ſend to us diſtinctly and openly under your ſeal the record and proceedings, with all things concerning the ſame, and this writ ſo that we may have them in fifteen days from the day of St. *Martin*, whereſoever we ſhall then be in *England*, that the record and proceedings aforeſaid being inſpected, we may cauſe further to be done thereupon for correcting that error, what of right, and according to the law and cuſtom of *England*, ought to be done. Witneſs ourſelf at *Weſtminſter*, the 26th day of *October*, in the 21ſt year of our reign.

The anſwer of Sir *John Vaughan* knt. the chief-juſtice within named.

Anſwer.

The record and proceedings of the plaint whereof mention is within made, with all things concerning the ſame, I ſend before our lord the king whereſoever, &c. at the day within contained, in a certain record to this writ annexed, as within I am commanded. [98]

John Vaughan.

Pleas at *Weſtminſter* before Sir *John Vaughan* knt. and his companions, juſtices of our lord the king of the bench, of the term of the Holy Trinity, in the 21ſt year of the reign of our lord *Charles* the Second, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. Roll. 752.

Debt againſt the ſheriff for an eſcape of one in execution.

Kent, to wit. *Robert Jaques*, late of the city of *Canterbury*, in the county of the city of *Canterbury* eſq. ſheriff of the county

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county of *Kent*, was ſummoned to anſwer *Auguſtin Ceſar*, doctor of phyſick, of a plea that he render to him 55l. 10s. which he owes to, and unjuſtly detains from him, &c. And whereupon the ſaid *Auguſtin*, by *Philip Bartholomew* his attorney, ſays, that whereas he the ſaid *Auguſtin* heretofore, to wit, in the term of St. *Michael*, in the 20th year of the reign of our lord the now king, before Sir *John Vaughan* knt. and his companions, then juſtices of our ſaid lord the king of the bench here, to wit, at *Weſtminſter*, by the conſideration of the ſaid court, recovered againſt *Joſeph Travers* late of the city of *Rocheſter*, in the county aforeſaid gent. 55l. 10s. which were adjudged to the ſaid *Auguſtin*, in the ſaid court here, for his damages which he had on occaſion of a certain treſpaſs by the ſaid *Joſeph* with force and arms, and againſt the peace of our lord the king at the city of *Rocheſter* aforeſaid, committed upon the ſaid *Auguſtin*, whereof he is convicted, as by the record and proceedings thereof remaining in the ſaid court of our ſaid lord the king of the bench aforeſaid here, to wit, at *Weſtminſter* aforeſaid, manifeſtly appears. And whereas the ſaid *Auguſtin*, for the more ſpeedy obtaining of the ſaid 55l. 10s. ſo as aforeſaid recovered, to wit, on the 23d day of *October* in the term of St. *Michael* aforeſaid, in the 20th year of the reign of our ſaid lord the now king aforeſaid, ſued and proſecuted, out of the ſaid court of our ſaid lord the king of the bench here, a certain writ of our ſaid lord the king of *capias ad ſatisfaciendum*, of and upon the ſaid judgment, againſt the ſaid *Joſeph*, directed to the then ſheriff of *Kent* (where the original writ of the treſpaſs aforeſaid firſt iſſued), by which ſaid writ our ſaid lord the now king commanded the ſaid then ſheriff of *Kent*, that he ſhould take the ſaid *Joſeph*, if, &c. and him ſafely, &c. ſo that he ſhould have his body before the juſtices of our ſaid lord the king here, to wit, at *Weſtminſter* aforeſaid, in 15 days from the day of St. *Martin* then next following *to ſatisfy Allan Lockhart eſq. clerk of our lord the king aſſigned in the court of our ſaid lord the king of the bench here, of* 88s. *and the ſaid Auguſtin of* 51l. 2s. amounting in the whole to the ſaid 55l. 10s. whereof the ſaid *Joſeph* was convicted, and that he ſhould have there then that writ, &c. At which ſaid day, to wit, in 15 days of

Plaintiff recovered judgment againſt one J. T. in the C. B. for 55l. 10s. ſee 2 Saund. 38, 39. Jones v. Pope.

and ſued out a *ca. ſa.* thereon againſt the ſaid J. T. to the ſheriff of K.

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St. *Martin*, came the ſaid *Auguſtin* by the ſaid P. B. then his attorney, and the ſaid ſheriff of *Kent*, to wit, Sir *John Williams* bart. then returned to the ſaid then juſtices of our ſaid lord the king of the bench here, that by virtue of the ſaid writ to him directed, he made his mandate to the bailiff of the liberty of the mayor and aldermen of the city of *Rocheſter* aforeſaid, to take and arreſt the ſaid *Joſeph*, which ſaid bailiff has the return of all writs and precepts, and the execution of the ſame within the ſaid liberty, ſo that no execution of the ſaid writ could be made by the ſaid ſheriff within the ſaid liberty; which ſaid bailiff had not given him any anſwer thereto.— Therefore at the inſtance of the ſaid *Auguſtin*, by another writ of our ſaid lord the king of *capias ad ſatisfaciendum* upon the ſaid judgment, the then ſheriff of *Kent* was then commanded, that he ſhould not omit by reaſon of any liberty of the bailiff of the liberty of the mayor and aldermen of the city of *Rocheſter* aforeſaid, but that he ſhould take the ſaid *Joſeph*, if, &c. and him ſafely, &c. ſo that he ſhould have his body here on the morrow of the purification of the bleſſed *Mary* then next following, *to ſatisfy the ſaid Allan of the ſaid* 88*s. and the ſaid Auguſtin of the ſaid* 51*l.* 2*s.* amounting in the whole to the ſaid 55l. 10s., whereof the ſaid *Joſeph* was ſo as aforeſaid convicted. At which day, to wit, on the ſaid morrow of the purification of the bleſſed *Mary* here came the ſaid *Auguſtin* by his attorney aforeſaid, and the ſheriff had done nothing thereon, nor had he ſent the writ thereof: therefore at the inſtance of the ſaid *Auguſtin*, as before, the then ſheriff of *Kent* was then commanded, that he ſhould not omit by reaſon of any liberty of the ſaid bailiff of the liberty of the mayor and aldermen of the city *Rocheſter* aforeſaid, but ſhould take the ſaid *Joſeph*, if, &c. and him ſafely, &c. ſo that he ſhoold have his body here in one month from the day of *Eaſter* then next following, *to ſatisfy the ſaid Allan of the ſaid* 88*s.*, *and the ſaid Auguſtin of the ſaid* 51*l.* 2*s.* amounting in the whole to the ſaid 55l. 10s., &c. whereof the ſaid *Joſeph* was ſo as aforeſaid convicted, and that the ſaid ſheriff ſhould have then there that writ. Which ſaid writ ſo as aforeſaid proſecuted the ſaid *Auguſtin* afterwards, and before the return of the ſaid writ, to wit, on the 24th day of *March* in the 21ſt year

Sheriff makes his mandate to the bailiff of the liberty of R.

who gave no anſwer.

Non omittas ca. ſa. ſued out.

Writ delivered to the defendant then ſheriff of K.

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year of the reign of our ſaid lord the now king, at the city of *Rocheſter* aforeſaid, in the ſaid county of *Kent*, was delivered to the ſaid *Robert Jaques*, then being ſheriff of the ſaid county of *Kent*, to be executed in form of law: by virtue of which ſaid writ, the ſaid *Robert Jaques*, ſo being then ſheriff of the ſaid county of *Kent* as aforeſaid, afterwards and before the return of the ſaid writ, to wit, on the ſaid 24th day of *March*, in the 21ſt year aforeſaid, at the city of *Rocheſter* aforeſaid, in the county of *Kent*, took and arreſted the ſaid *Joſeph*, and then and there had him in his cuſtody in execution for the damages aforeſaid: And the ſaid *Joſeph* being ſo as aforeſaid in the cuſtody of the ſaid *Robert Jaques*, then ſheriff of the ſaid county of *Kent*, in execution for the damages aforeſaid, he the ſaid *Robert Jaques* afterwards, to wit, on the ſaid 24th day of *March*, in the 21ſt year aforeſaid, then being ſheriff of the ſaid county of *Kent*, permitted the ſaid *Joſeph*, at the city of *Rocheſter* aforeſaid, againſt the will of the ſaid *Auguſtin*, to eſcape out of his cuſtody, and go at large whereſoever he would, he the ſaid *Auguſtin* not being ſatisfied or paid the damages aforeſaid ſo as aforeſaid recovered; whereby an action has accrued to the ſaid *Auguſtin* to demand and have, of and from the ſaid *Robert Jaques*, the ſaid 55l. 10s., yet the ſaid *Robert* (although often required) has not yet paid to the ſaid *Auguſtin* the ſaid 55l. 10s., but to pay the ſame to him has hitherto altogether refuſed, and ſtill refuſes; wherefore he ſays, he is injured, and has ſuſtained damage to the value of 20l., and therefore he brings ſuit, &c.

[100]

who by virtue thereof arreſted the ſaid J T.

and afterwards permitted him to eſcape.

whereby an action has accrued to the plaintiff, &c.

Judgment by non ſum informatus.

And the ſaid *Robert Jaques* by *John Dawling* his attorney, comes and defends the wrong and injury, when, &c. and the ſaid attorney ſays, that he is not informed by the ſaid *Robert* his maſter, to give any anſwer for the ſaid *Robert* to the ſaid *Auguſtin* in the ſaid plaint, and he ſays nothing elſe thereto; wherefore the ſaid *Auguſtin* remains againſt the ſaid *Robert*, undefended therein. Therefore it is conſidered, that the ſaid *Auguſtin* recover againſt the ſaid *Robert* his debt aforeſaid, and his damages on occaſion of the detention of the ſaid debt to 60s. adjudged by the court here to the ſaid *Auguſtin*, with his aſſent, and the ſaid *Robert* in mercy, &c.

Judgment.

Caſe 17

Jaques *verſus* Ceſar.

Paſchæ 22. Car. II. Regis. Rot. 752.

ERROR (1) by *Jaques* againſt *Ceſar* to reverſe a judgment in the common pleas in an action of debt for an eſcape, in which the plaintiff declared, that he had recovered in the common pleas againſt one *Joſeph Travers* 55l. 10s. for damages in an action of treſpaſs, and that he had ſued out a writ of *capias ad ſatisfaciendum* againſt *Travers*, directed to the ſheriff of *Kent*, by which the ſheriff was commanded to take *Travers* to ſatisfy (*a*) *Allan Lockhart*, eſq. clerk of our lord the king aſſigned in the court of our lord the king of the bench here 88s., and *Auguſtin Ceſar*, who was the plaintiff in the common pleas, 51l. 2s. amounting in the whole to 55l. 10s. whereof he was convicted, &c. and that by force of that writ, the defendant being ſheriff of *Kent* took *Travers* in execution,

S C 2 Keb. 646. The plaintiff had judgment for 55l. 10s and the *ca. ſa* upon which the defendant was taken in execution was only for 51l 2s. and the plaintiff in debt for an eſcape recovered againſt the ſheriff 55l. 10s — This miſtake in the execution is not aſſignable for error by the ſheriff.

[(*a*) 101]

(1) A writ of error is an original writ, iſſuing out of the court of chancery, in the nature, as well of a *certiorari* to remove a record from an inferior into a ſuperior court, as of a commiſſion to the judges of ſuch ſuperior court to examine the record, and to affirm, or reverſe it, according to law; and lies, where a party is aggrieved by any error in the foundation, proceeding, judgment or execution, of a ſuit in a court of record. Co. Litt. 288. b. 2 Bac. Abr. 187. 2 Inſt. 40. Upon the ground of its being in the nature of a *certiorari*, it is holden, that though the writ is irregularly ſued out, and would therefore be quaſhed in the ſuperior court, yet the record is removed by it, if rightly deſcribed, and remains in the ſuperior court after the writ is quaſhed. 1 Str. 606. *Cowper* v. *Ginger*. S. C. 2 Ld. Raym. 1403. 8 Mod. 316. 2 Term Rep. 737. *Laroche* v. *Waſbrough*. *Arg.* Caſ. Temp. Hardw. 135. *Ratcliff* v *Burton*. 1 Str. 233. *Brewer* v. *Turner*. 8 Mod. 305. *Cooper* v. *Ginger*. And upon the principle of its being in the nature of a *commiſſion*, it is, that a writ of error was not amendable at common law, becauſe no court was ever allowed to amend its own commiſſion. 1 Str. 607. *Cowper* v *Ginger*. But in a writ of error *coram nobis* hereafter noticed, the *certiorari* part, being unneceſſary, is omitted, and the writ contains only a commiſſion to examine errors. The form of a writ of error from the common pleas to the king's bench, is that in the beginning of this entry; and the form

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tion, and afterwards let him go at large, the debt not being ſatisfied, whereby an action accrued to the plaintiff to demand and have the 55l. 10s. of the defendant, yet, &c.

The defendant in the common pleas ſuffered judgment to paſs by *nihil dicit*, and thereupon the plaintiff had judgment to recover 55l. 10s. and coſts of ſuit, upon which the defendant

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form of a writ of error *coram nobis*, may be ſeen in Tidd's *Prac. Forms*, 468.

A writ of error is grantable in all caſes *ex debito juſtitiæ*, except in treaſon and felony; ſo reſolved by ten of the judges. 2 Salk. 504. *Reg.* v. *Paty*. And a diſtinction is taken by Lord *Holt*, that wherever a new juriſdiction is created by act of parliament, and the court or judge that exerciſes this juriſdiction, acts as a court or judge of record, *according to the courſe of the common law*, a writ of error lies on their judgments; but where they act *in a ſummary method*, or in *a new courſe different from the common law*, a writ of error does not lie, but a *certiorari*. 1 Salk. 263. *Groenvelt* v. *Burwell*. S. C. Carth. 494. Com. Rep. 80. S P. 1 Salk. 144. If an erroneous judgment be given in a court, which is *not* a court of record, no writ of error lies, but a writ *of falſe judgment*. F. N. B. 38. A. 7 edit. Co. Litt. 288. b.

A writ of error lies for ſome error or defect *in ſubſtance*, which is not aided at common law, or by ſome of the ſtatutes of jeofails; and may be brought in the *ſame* court where the judgment was given, or to which the record is removed by writ of error, or in *another* court. Error may be brought in the ſame court where the judgment was given, when the error is not aſſigned for any fault *in the court*, but for ſome defect in the execution of the proceſs; or through the default of the clerks. 1 Roll. Abr. 746. F. N. B. 49. T. 7 edit. Indeed it is ſaid that the court of common pleas may *in the ſame term* reverſe their own judgment for error in proceſs, or default of the clerks, without any writ of error; but in *another term*, the party muſt ſue out a writ of error to the king's bench. F. N. B. 49 T. 7 edit. So a writ of error may be brought in *the ſame court* for an error *in fact*; thus, where an erroneous judgment is given, in matter of fact only, and not in point of law, in the king's bench, it may be reverſed in the *ſame* court by writ of error, which is ſometimes called error *coram vobis*, but more correctly, *coram nobis*, or *quæ coram nobis reſident*; becauſe the record and proceſs, on which it is founded, are ſtated in the writ to remain in the court of our lord the king before the king himſelf: as where the defendant, being under age, appeared by attorney; or the plaintiff or defendant was a married woman at the time of commencing the ſuit, or died before verdict, or interlocutory judgment. 1 Roll. Abr. 747. pl 13. Cro. Eliz. 106. *Meggot* v. *Broughton*. 1 Sid. 208. *Rex* v. *Cornwall*. But if the error be in *the judgment* itſelf, and not in the proceſs, a writ of error does not lie in the ſame court.

ant brought a writ of error in this court. And now *Saunders* aſſigned for error at the bar, that the plaintiff in the common pleas had demanded, and had judgment to recover more than, by his own ſhewing, was due to him; for though he had judgment in the firſt action to recover 55l. 10s., yet the writ of *capias ad ſatisfaciendum* was to ſatisfy the plaintiff only 51l.

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court, but muſt be brought in another. 1 Roll. Abr. 746. pl. 1. 2 Bac. Abr. 215. So if a record be removed into the king's bench by a writ of error, and the writ afterwards abate, either by judgment of the court, or by plea, death, or otherwiſe; 1 Roll. Abr. 753. (Q.) pl. 1. Yelv. 6. *Crumwell* v. *Andrews*. Cro. Eliz. 891. *Andrews* v. *Cromwell*. Latch. 198. *Dun* v. *Deane* and *Chapter of Carliſle*; Or if it be *quaſhed* for any other fault than variance, Carth. 367. *Walker* v. *Stokoe*. S. C. 1 Ld. Raym. 151. 1 Str. 606. *Cooper* v. *Ginger*. S. C. 2 Ld. Raym. 1403. 8 Mod. 316; error *coram nobis* lies in that court; for if there had been a *variance* between the record and the writ of error, the record was not removed, but there muſt have been a new writ; and therefore error *coram nobis* did not lie. Indeed it is not neceſſary now to have a new writ of error, becauſe by the ſtatute 5 Geo. 1. c. 13. it is enacted, "that "all writs of error, wherein there ſhall "be any variance from the original "record, or other default, ſhall be "amended and made agreeable to ſuch "record, by the reſpective courts "where ſuch writs of error ſhall be "made returnable." But error *coram nobis* does not lie in the king's bench after an affirmance in that court. 2 Str. 949. *Horn* v. *Buſbel*. Ibid. 975. *Burleigh* v. *Harris*, in which laſt caſe, 1 Salk. 337. *Winchurch* v *Belwood* to the contrary is denied; nor does it lie in the king's bench after an affirmance in the exchequer chamber. 1 Str. 697. *Lambell* v. *Pretty-John*. And if a writ of error, brought into the exchequer-chamber upon a judgment in the king's bench, abate by death or otherwiſe, no writ *coram nobis* lies there, for the record itſelf is not removed there by the writ of error, but only a tranſcript; and therefore there muſt be a new writ of error. 1 Roll. Abr. 755 pl. 16. Cro. Jac. 620. *Cave* v. *Polewheel*. So a writ of error does not lie for error *in fact*, either in the exchequer chamber, or houſe of lords. 2 Lev. 38. *Hopkins* v. *Wrightſworth*. S. C. 1 Vent. 207. Com. Rep. 597 *Roe* v. *More*.

Next with reſpect to a writ of error to *another* court. A writ of error lies from the common pleas, and alſo from all inferior courts of record in *England*, except in *London* and ſome other places, to the king's bench, for the error or miſtake of the judges in point of law. 4 Inſt. 21, 22. Finch. Law. 480. 2 Burr. 777. *Bullard* v. *Bennet*; and after judgment is given thereon in the king's bench, another writ of error may be brought upon that judgment in the houſe of lords: but a writ of error does not lie in the *common pleas* upon an erroneous judgment given in an inferior

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5 l. 2s., and to ſatisfy *Lockart* the prothonotary, the reſidue being 88s.: and the prothonotary may recover it for the eſcape, but the plaintiff ought not, becauſe *Travers* never was in execution at the ſuit of the plaintiff for and more than 5 l. 2s., and yet he demanded 55 l. 10s. in his action for the eſcape, and ſo he declared for more than he ought. And that

court of record. Cro. Eliz. 26 *Roe* v. ... *y*. Finch Law. 480. Dy. 250. A writ of error lies from the proceedings on the law ſide of the exchequer into the court of exchequer-chamber before the lord chancellor, and lord treaſurer, calling to their aſſiſtance the judges of the courts of king's bench, and common pleas, or ſome of them: and from thence it lies to the houſe of lords. 2 Bac. Abr. 213. ſtat. 31 Edw. 3. c. 12 4 Inſt. 105. But the chancellor and treaſurer, or the chancellor only, if there be no treaſurer, are the judges there, and judgment ſhall be entered purſuant to their ſentence, though the other juſtices differ in opinion. 8 H. 7. 13. a. Carth. 388. *King* v. *Hornely*, or the *Banker's caſe*. 3. C. 5 Mod. 42—62. Upon a judgment given in the huſtings in *London*, a writ of error lies at *St. Martin's* before certain commiſſioners appointed under the great ſeal, and from thence immediately into the houſe of lords. 1 Roll. Abr. 745. pl. 19. poſt. 253. 2 Bac. Abr. 215. If an erroneous judgment be given in the cinque-ports, a writ of error does not lie into the king's bench, but it ſhall be redreſſed before the conſtable of *Dover* at the court at *Shepway*, 4 Inſt. 224. Upon a judgment given in the court of *Stannaries* in the duchy of *Cornwall*, for any matters touching the *Stannaries*, no writ of error lies to the king's bench, but the courſe is to appeal to the warden of the *Stannaries*, and from him to the prince, and when there is no prince, to the king's council. 1 Roll. Abr. 745. pl. 8. 3 Bulſt. 183. *Langworthy* v. *Scott*. A writ of error lies in the king's bench upon a judgment in a county-palatine, becauſe it was derived from the crown. 1 Roll. Abr. 745. pl. 7. Dy. 321. a. 21 H. 7. 33. b. And by ſtatutes 34 and 35 H. 8. c. 26. ſ. 113. and 1 W. and M. c. 27 ſ. 4. errors in judgment in pleas real, mixed, and perſonal, before the juſtices in their great ſeſſions in *Wales*, ſhall be redreſſed by writ of error in the king's bench.

Formerly, no writ of error lay on a judgment in the king's bench in any other court except in parliament; but now by ſtatute 27 Eliz. c. 8. it is enacted, "that where any judgment ſhall "be given in the king's bench, in an "action of debt, detinue, covenant, "account, action upon the caſe, ejectment, or treſpaſs, *firſt commenced there*, "other than ſuch only where the queen "ſhall be party, the plaintiff or defendant againſt whom ſuch judgment ſhall "be given, may *at his election* ſue out "of the court of chancery a ſpecial "writ of error, directed to the chief "juſtice

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that here the ſheriff does not take advantage of any error in the *capias ad ſatisfaciendum*, but the *writ itſelf* was only for 51l. 2s. for the plaintiff, and therefore he cannot ſue for more upon the eſcape. And if a judgment be given for 100l., and the party ſue out a *capias ad ſatisfaciendum* only for 50l. parcel of the 100l., and the ſheriff take the priſoner, and ſuffer him

" juſtice of the king's bench, com-
" manding him to cauſe the record,
" and all things concerning the judg-
" ment, to be brought before the juſ-
" tices of the common-bench, and
" barons of the exchequer, into the
" exchequer-chamber, there to be ex-
" amined by the ſaid juſtices and ba-
" rons, which ſaid juſtices, and ſuch
" barons as are of the degree of the
" coif, or ſix of them at the leaſt, ſhall
" have full power and authority to
" examine all ſuch errors as ſhall be
" aſſigned in or upon any ſuch judg-
" ment, and thereupon to reverſe or
" affirm the ſame, as the law ſhall re-
" quire. *other than for errors concerning*
" *the juriſdiction of the court of king's*
" *bench*, or for *want of form* in any writ,
" return, plaint, bill, declaration, or
" other pleading, proceſs, verdict,
" or proceeding whatſoever; and after
" the ſaid judgment ſhall be affirmed
" or reverſed, the ſaid record, and all
" things concerning the ſame, ſhall be
" brought back into the king's bench,
" that further proceedings may be had
" thereupon, as well for execution as
" otherwiſe; but ſuch reverſal or affir-
" mation ſhall not be ſo final, but that
" the party grieved ſhall and may ſue
" in the high court of parliament, for
" the further and due execution of the
" ſaid judgment, as was then uſual
" upon erroneous judgments in the court
" of king's bench." In the conſtruction of this ſtatute it is holden, that a writ of error does not lie in the exchequer-chamber upon a judgment in the king's bench, in an action commenced there by *original writ*, but only where the action is *by bill*. 1 Sid. 424. *Redman* v. *Eldolph*. Doug. 352. *Lloyd* v. *Skutt*, note (7). 1 Saund. 346. *Miller* v. *Spateman*, and note (4.) and that the ſtatute is confined to the ſeven particular actions enumerated therein, ante 1. a. *note*: and does not extend to an action of replevin; 2 Roll. Rep. 140. 434; or of *ſcandalum magnatum*, for it is not a mere action upon the caſe, but is founded on the ſtatute 2 Ric. 2. c. 5, and is for the king and party; Cro. Car. 142; Lord *Say* and *Seale* v. *Stephens*, S. C. Sir W. Jones, 194, 195 [illegible] 82. 1 Sid. 43. *Lord Stamford* v. *Needham*. 1 Vent. 49. 2 Ld. Raym. 954 *Aſhby* v. *White*; or of reſcous, though it is in the nature of a treſpaſs; Cro. Jac. 171. *Vaughan* v. *Williams*. Moor. 694. *Ody* v. *Tate*: or of raviſhment of ward; 2 Roll. Rep. 134. *Barnefield* v. *Hutchins*; or to a judgment in *ſcire facias* upon a recognizance of bail; Cro. Jac. 171. *Vaughan* v. *Williams*. Yelv. 157. *Prowſe* v. *Turner*. Sir W. Jones, 325. *Lancaſter* v. *Keylei*. 1 Ld. Raym. 98, *Hartop* v. *Holt*. In theſe actions therefore a writ

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him to eſcape, now the party who ſued out the execution ſhall recover upon the eſcape only the 50l. for which the priſoner was taken in execution, and not the whole 100l. contained in the judgment. And ſo it is here; wherefore he concluded that the judgment was erroneous.

Sed

of error will not lie in the exchequer-chamber, but muſt be brought in parliament. If a *ſcire facias* be brought to revive a judgment againſt the party, or his executors, a writ of error will lie in the exchequer-chamber, *tam in redditione judicii, quam in adjudicatione executionis*, becauſe it is only in execution of the firſt judgment, the merits of which ſtill remain to be examined. 1 Ld. Raym. 98. *Hartop* v. *Holt*. S. C. 1 Salk. 263. 1 Vent. 168, 169. *Skinner* v. *Webb*. Cro. Car. 464. *Anon.* but not upon an award of execution only. 1 Ld. Raym. 98. 2 Str. 1102. *Bertie* v. *Clatterbuck*. Andr. 287. *Crow* v. *Maddock*: even though the judgment has been affirmed in the exchequer-chamber, and execution is afterwards awarded in the king's bench. 1 Ld. Raym. 97. *Hartop* v. *Holt*. S. C. 1 Salk. 263. 5 Mod. 228. If a judgment be affirmed in the king's bench on error, a writ of error lies from thence to the houſe of lords, and not to the exchequer-chamber. 1 Roll. Rep. 264. *Harvey* v. *Williams*. 2 Bulſ. 162. See the form of a writ of error into the exchequer-chamber. Clift. 322. Tidd's *Prac. Forms*, 471. It was for ſome time a queſtion, whether a writ of error lay in the exchequer-chamber, upon a judgment in an action of debt *qui tam* upon the ſtatute of uſury, or other penal actions, where the king is a party. 1 Sid. 240. *Whitton* v. *Preſton*. 1 Vent. 49. *Parris*'s caſe. 5 Mod. 230. *Hartop* v. *Holt*. Ley. 82. Sir T. Raym. 275. *Scot* v. *Knapton*; but it now is holden, that a writ of error does lie there in ſuch actions. Doug. 353. *Lloyd* v. *Skutt*, not (91).

Regularly no writ of error doth lie, unleſs there be a judgment, or an award in nature of a judgment; for the words of the writ are, "*ſi judicium redditum* "*ſit*, &c." Co. Litt. 288. b. Therefore it was formerly holden, that a writ of error could not be brought *before* judgment was given; and if it bore teſte *before*, it was no *ſuperſedeas*. 1 Roll. Abr. 749. (M.) pl. 1. Moor. 461. pl. 647. 2 Bac. Abr. 199. But it ſeems now agreed, that a writ of error which bears teſte before the judgment, is good, provided the judgment is given before *the return* of the writ; and this is the uſual courſe for preventing and ſuperſeding executions; and as the judgment relates to the firſt day of the term, a writ of error returnable after that day will remove the record, whenever the judgment is entered. 1 Vent. 96. *Prydyerd* v. *Thomas*, 255. *Baker* v. *Bulſtrode*. 1 Mod. 112. *Ayres* v. *Lenthall*. 2 Sid. 104. *Williams* v. *Jenkins*. 1 Str. 632. *Morſoot* v. *Chivers*. 1 Term Rep. 279. *Jaques* v. *Nixon*. Still however, a writ of error will not remove a judgment given after the term, in which the writ of error is returnable, but a writ of error ſo returnable before

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In debt againſt a ſheriff for an eſcape, he cannot take advantage of error in the proceſs of execution. See 1 Saund. 38, 39 *Jones* v. *Pope*.

Sed non allocatur; for as it ſeems, the court over-ruled the exception, and ſaid that the ſheriff cannot take advantage of an error in proceſs (2); and thereupon the judgment was affirmed by the court, who would not hear any more of the matter.

before the judgment may be quaſhed, unleſs the plaintiff has delayed ſigning judgment until after the return of the writ, on purpoſe to defeat it. 2 Ld. Raym. 1179. *Wilſon* v. *Ingoldſby*. Ibid. 1531. *Canning* v. *Wright*. S. C. 2 Str. 807. 834. *Rejindoz* v. *Randolph*. 891. *Vice* v. *Burton*.

By ſtatute 10 and 11. W. 3. c. 14. it is enacted, "that no judgment in any "real or perſonal action, ſhall be reverſ-"ed or avoided, for any error or defect "therein, unleſs the writ of error be "brought, and proſecuted with effect "within twenty years after ſuch judg-"ment ſigned, or entered of record." The ſtatute has the uſual exceptions in favor of infants, femes-covert, perſons *non compos mentis*, in priſon or beyond the ſeas. But the court will not on motion quaſh a writ of error, though brought twenty-nine years after the judgment, for it would deprive the party of the benefit of replying the exceptions in the ſtatute. 2 Str. 837. *Higgs* v. *Evans*.

This writ is uſually brought by the party or parties againſt whom the judgment was given; and it may be brought by the plaintiff to reverſe his own judgment, if erroneous, or given for a leſs ſum than he has a right to demand, in order to enable him to bring another action. 3 Bur. 1772. *Johnſon* v. *Jebb*. If an action be brought againſt A. as a feme-ſole, who is in truth a feme-covert, and ſhe plead to iſſue as a feme-ſole, and afterwards judgment be given againſt her, and ſhe be taken in execution, ſhe and her huſband together may bring a writ of error, becauſe otherwiſe the huſband may be deprived of the ſociety of his wife, and of her care in his domeſtic concerns, and in truth he has no other means to help himſelf. 1 Roll. Abr. 748. pl. 18. *Hayward* v. *Williams*. S. C. Sty. 254. 280. So if an action be brought againſt a feme-covert and others, they may all join with the huſband in a writ of error. 1 Roll. Abr. 748. pl. 19.

We have already obſerved, that no perſon can bring a writ of error, unleſs he is party or privy to the record, or is prejudiced by the judgment, and therefore receives advantage by the reverſal of it; *Ante*, 46. note (6.) It ſeems to be a ſettled rule, that the writ muſt be brought in the names of *all* the parties againſt whom the judgment is given, that it may agree with the record; and notwithſtanding the death of any of the parties, he muſt ſtill be named, and his death alleged in the writ, though the writ may be brought by the ſurvivors alone, thus, "Becauſe in the record and "proceedings, and alſo in the giving "of judgment, in a plaint which was "in our court before you and your "companions, or juſtices of the bench, "by our court, between A. B. (for "whom judgment was given) and C. D. "late of, &c. and E. F. (againſt whom "judgment was given) and C. D. late of, "&c. and E. F. (againſt whom judg-

" ment was given,) *which ſaid C. D.* " *is ſince deceaſed, &c* to the great dam- " age of the ſaid *E F who has ſurvive-* " *ed the ſaid C. D, &c.*" Palm 152. *Bethill* v *Parry* 6 Rep 25. *Ruddock's* caſe S C. Cro. Eliz. 648, 649. Yelv. 4 *Crumweli* v. *Andrews*. S C. Cro. Eliz. 892 Carth 7. 8. *Hacket* v *Herne*. S. C. 3 Mod. 134. 1 Ld. Raym. 71. *Walker* v. *Stokoe*. S. C 5 Mod 10. 69. Carth. 367. Comb. 354. 1 Ld Raym. 328. *Burr* v. *Atwood*. Ld. Raym. 870. *Rous* v. *Etherington* S C. 1 Salk. 312, 313. 1 Str. 233, 234. *Brewer* v. *Turner*. 2 Ld. Raym. 1403 *Ginger* v. *Cowper*. S. C. 1 Str. 606. 8 Mod. 305. 316. 2 Ld. Raym. 1532. *Elkins* v. *Payne*. Cafes temp. Hardw. 135 *Ratcliff* and *Burton* 1 Will. 80. *Harper* v. *Faux*. 3 Burr 1792. *Knox* v. *Coſtello*; for where there is judgment againſt ſeveral, if one alone ſhould be permitted to bring a writ of error every defendant might bring a writ of error, and delay the plaintiff from his execution for a long time, Carth. 8. *Hacket* v. *Herne* 3 Burr 1792, and the writ is brought by one or more of the defendants only may be quaſhed. Carth 8. 1 Ld. Raym. 71. *Walker* v. *Stokoe*. But if, in treſpaſs againſt two or more, one pleads to iſſue, and there is a verdict and judgment for him, and a judgment by default and afterwards final judgment againſt the others, or they all plead to iſſue, and one is found not guilty and there is a verdict and judgment againſt the others, they may bring a writ of error, without the defendant who was acquitted, for he cannot ſay that it was *to his damage*; 1 Lev. 210. *Cannon* v. *Abbot*. S. P. Hob 70. *Parker* v. *Lawrence*. 2 Str 892 Ibid. 1110. *Rex* v. *Inhabitants of All Saints*. Cowp. 425. *Vereſſt* v. *Raſael*: but the ſuit muſt be deſcribed in the writ according to the record. 1 Str. 682. *Lady Caſs* v. *Tute*. Where one only of ſeveral defendants brings a writ of error, he muſt do it in the names of all, and if any one or more of them refuſe to appear and aſſign errors, they muſt be *ſummoned and ſeverel*, and then the writ of error may be proceeded in by the reſt only. Yelv. 4 *Crumweli* v. *Andrews*. S. C Cro. Eliz. 892 Carth 7, 8 *Hacket* v. *Herne*. 3 Mod. 40 *Shepherd* v. *Orchard*. 1 Str. 234. *Brewer* v. *Turner*: and the court will give them time to aſſign errors, till there can be a ſummons and ſeverance of the others 2 Str. 783. *Freſchbaldi* v. *Kinaſton*; ſee the form of the writ of ſummons, Theſ Brev. 301.

But with reſpect to *defendants* in error, it has been holden, that where one only of two defendants in error appeared, and tied out a *ſcire facias quare executionum non*, and the plaintiff in error thereupon aſſigned errors, it was a waver of the objection that the other ſhould have joined, and the court was not to preſume that he was alive. 3 Burr. 1792. *Knox* v. *Coſtello*.

A writ of error is conſidered as a new action; and therefore the defendant in the original action may change his attorney, without obtaining a judge's order for that purpoſe. 7 Term Rep. 337. *Batchelor* v. *Ellis*. It runs in the king's name; and, except in a county palatine, muſt be directed to the chief juſtice, or other officer who has the cuſtody of the record; as in the common pleas, " to " our truſty, or right truſty, and well- " beloved *John Lord Eldon*, our chief- " juſtice of the bench." Lill. Ent. 222. 268. 281. 1 Rich. Prac C. P. 426. 5th edit. Tidd's *Prac Forms*, 470: in the king's bench, " to our truſty, or " right truſty, and well-beloved *Lloyd* " *Lord Kenyon* our chief juſtice aſſigned " to hold pleas before us, or, in our " court

"court before us." Lill. Ent. 213. 254. 258. Tidd's *Prac. Forms*, 471, or if it be a writ of error *coram nobis*, "to "our juſtices aſſigned to hold pleas be- "fore us." Lill. Ent. 220. 231, 232. Tidd's *Prac Forms*, 468, and the writ of error in parliament is directed to the chief-juſtice of the king's bench upon a judgment of that court. Lill. Ent. 254. See the form of a writ of error from the king's bench to the houſe of lords on a judgment originally given there, Tidd's *Prac. Forms*, 474, and on a judgment affirmed there. Ibid. or in the exchequer-chamber. Lill. Ent. 254 Tidd's *Prac. Forms*, 474, and on a judgment affirmed there. Ibid or in the exchequer chamber. Lill. Ent. 254. Tidd's *Prac. Forms*, 475; and from the law ſide of the court of exchequer the writ of error is directed to the treaſurer of the exchequer, and barons, for the record is in their cuſtody. 1 Inſt. 105. In the county-palatine of *Lancaſter* the writ of error is directed to the chancellor of the county-palatine, or his deputy, commanding him that he make his mandate to the juſtices of *Lancaſter*, that they ſend to him in his chancery, the record, &c. and the writ which came to them thereupon, and that he tranſmit the record, *ante*, 84. Clift. 335. To reverſe a fine levied in the common pleas, the writ of error is directed to the chirographer, for the tranſcript, or the *note*, of the fine, and *writs* of covenant; Lill. Ent. 280 or to the *cuſtos brevium*, for the tranſcript of the *foot* of the fine. Ibid. 282. And in inferior courts the writ of error ſhould be directed to the judges before whom the judgment was given. See *ante*, 28. 42. Where the writ of error is ſuppoſed to be, *as well* in giving the judgment, *as* in awarding execution upon it, the writ of error is ſaid to be *tam quam*, or in the words of the writ, *tam in redditione judicii, quam in adjudicatione executionis.* 2 Str 1055. *Street* v. *Hopkinſon.* S. C. Caſ. temp. Hardw. 345.

The writ of error is delivered to the clerk of the errors of the court in which the judgment is given, who will thereupon *allow* the ſame, and give a certificate or note of the allowance; ſee the form of the allowance, Tidd's *Prac. Forms*, 476. A writ of error, ſued out and allowed *before* final judgment, continues in force during the whole term in which it is returnable; and if final judgment be ſigned at any time during that term, or in the ſubſequent vacation, it is a ſuperſedeas or ſtay of execution *from the time of ſigning the judgment* Barnes, 196. *Warwick* v. *Figg*. 107. *Cook* v. *Horrock*. 198. *White* v. *Morgan*. 1 Str. 532. *Morſoot* v. *Chiver* provided bail, when requiſite, be put in thereon, within four clear days *after judgment is ſigned*. 2 Str. 781. *Hunter* v *Simpſon*. 1 Term Rep. 279. *Jaques* v. *Nixon*, and *Doe* v. *Bracebridge* there cited. 4 Term Rep. 121. *Bennet* v. *Nichols*. And the court of king's bench has gone ſo far in ſupport of the practice of ſuing out a writ of error before final judgment, that if the writ be ſued out and allowed, and the plaintiff will not ſign final judgment till a ſubſequent term after the return of the writ, in order to avoid the effect of it, and then ſue out execution, the court will ſet it aſide. 1 Term. Rep. 280. *Jaques* v. *Nixon*. Barnes, 260. *Curd* v. *Eamead*. But a writ of error ſued out *after* final judgment, and before execution executed, is a ſuperſedeas of execution, *from the time of its allowance*, and not from the time of ſervice of the allowance. 1 Salk. 321 *Perkins* v. *Woolaſton*. S. C. 6 Mod. 130. 1 Vent. 30. *Cotton* v. *Daintry*. 1 Burr. 340. *Capron* v. *Archer*. Willes's Rep. 271. *Meriton* v. *Stevens*. S. C. Barnes, 205.

1 Boſ. and Pull. 478. *Gravall* v. *Stimpſon*; provided bail when requiſite, be put in and perfected within four days *after the allowance*: the diſtinction being that if a writ of error be allowed *before* judgment, the time of putting in bail runs from the ſigning of the judgment, but where it is allowed *after* judgment, the time of putting in bail runs from the time of the allowance, that is, after the delivery of the writ to the clerk of the errors. 2 Str. 781. *Hunter* v. *Sampſon*. 1 Term Rep. 279. *Jaques* v. *Nixon*. 1 Boſ. and Pull. 478, 479. *Gravall* v. *Stimpſon*; the *ſervice* of the allowance is only material to bring the attorney into contempt for proceeding to ſue out execution afterwards. 2 Roll Abr. 492. pl. 7. 1 Burr. 540. *Capron* v. *Archer*. 1 Term. Rep. 280. *Jaques* v. *Nixon*. Willes's Rep. 275. *Meriton* v. *Stevens*. Barnes, 276. *Hannot* v. *Farettes*. If after the allowance of a writ of error, and before the expiration of the four days for putting in bail, the plaintiff will take out execution, he does it at his peril; for if bail be put in, in due time, the execution will be ſet aſide; but if no bail be put in, it will be good, and the writ of error become a mere nullity. 2 Term Rep. 44. *Lane* v. *Bacchus*. And it has been holden, that a writ of error is ſo abſolutely a ſuperſedeas, that, after it is allowed, the plaintiff cannot take out a *capias ad ſatisfaciendum*, and have it returned *non eſt inventus* in order to proceed againſt the bail. 2 Str. 867. *Sweetapple* v. *Goodfellow*; and if he do ſo, the whole may be ſet aſide upon motion. 2 Black. Rep. 1183. *Dudley* v. *Stokes*. And where the plaintiff ſued out a *capias ad ſatisfaciendum* before the allowance of a writ of error, which was afterwards allowed, and notice thereof given before the *capias ad ſatisfaciendum* was returnable, he cannot call for a return of *non eſt inventus*. 2 Str. 1186. *Smith* v. *Nicholſon*. S. C. 1 Wilſ. 16 though the *capias ad ſatisfaciendum* has lain in the office four days before the allowance of the writ of error. 5 Term Rep. 390. *Perry* v. *Campbell*. And if the ſheriff ſhould return *non eſt inventus*, and the plaintiff ſue out a *ſcire facias* againſt the bail upon their recognizance, they may plead that after the iſſuing of the *capias ad ſatisfaciendum*, and before it was returnable, a writ of error was iſſued and duly allowed, although it be not returned. 2 Eaſt. 409. *Sampſon* v. *Brown*. And if bail in error, when required, are not put in, the plaintiff muſt ſhew that in his replication. Ibid. 445. If the defendant ſue out a writ of error which is allowed, and the plaintiff bring an action on the judgment, and recover, he will not be permitted to ſue out execution on the ſecond judgment, till the writ of error be determined; for that would be allowing the plaintiff to have the fruit of his firſt judgment indirectly, which he cannot have directly by ſuing out execution upon it. 3 Term Rep. 643. *Benwell* v. *Black*. S. P. 4 Burr. 2454 *Taſwell* v. *Stone* But where a writ of error is brought againſt good faith, 2 Term. Rep. 183. *Cates* v. *Weſt*; or where it manifeſtly appears either from the confeſſion of the parties themſelves, or from the admiſſion of the attorney of the party who ſues out the writ of error, or from expreſſions equivalent to an admiſſion, that it is brought for the mere purpoſe of delay, 2 H. Black. 30. *Mitchell* v. *Wheeler*, and *Goodin* v. *Hammond* there cited, note (*a*). 3 Term Rep. 79. *Pool* v. *Charnock*. 4 Term Rep. 436. *Kemp and* v. *Macauley*. 5 Term Rep. 669. *Levett* v. *Perry*. 714. *Maſterman* v. *Grant*, it is holden to be no ſuperſedeas.

An execution, being an intire thing, cannot be ſuperſeded after it is once begun; therefore where a wait of *fieri facias* was ſued out, and the ſheriff levied

on the defendant's goods under it, and afterwards, but before the ſale, a writ of error was allowed, it was adjudged that the ſheriff muſt notwithſtanding ſell the goods levied under the execution, but not proceed any further, and return the money into court to abide the event of the writ of error. Willes's Rep. 271. *Merion* v. *Stevens*. Cro. Eliz. 597. *Charter* v. *Peter*. Moor. 542. Yelv. 6. *Tocock* v. *Honyman*. 1 Vent. 255. *Baker* v. *Bulſtrode*. So long as the writ of execution is executable, but not executed, the allowance of a writ of error is a ſuperſedeas, but not afterwards. 1 Salk. 321. *Perkins* v. *Woolaſton*; in which laſt caſe it is ſaid, that the utmoſt length of time which the law allows to execute a writ, is the day on which it is returnable; and that it cannot be executed on that day *after the riſing of the court*: but it has been ſince holden that it may be ſerved *at any time* of the laſt day without any regard to the time of the riſing of the court. 2 Barr. 8 2. *Maud* v. *Barnard*.

As to bail in error, it is to be obſerved that no bail was required at common law, but is now in many caſes by particular ſtatutes. By ſtatute 3 Jac. 1. c. 8. (made perpetual by ſtatute 3 Car. 1. c. 4. ſ. 4.) it is enacted, "that no execution ſhall be ſtayed or delayed, "upon or by any writ of error (2 Eaſt. "4 9.) or ſuperſedeas thereupon to be "ſued, for the reverſing of any judgment "in any action or bill of debt upon any "*ſingle-bond* for debt, or upon any obligation with condition for the *payment* "*of money only*, or upon any action or bill "of debt for *rent*, or upon any *contract*, "ſued in any of the courts of record at "*Weſtminſter*, or in the counties-palatine "of *Cheſter*, *Lancaſter*, or *Durham*, or "the courts of great ſeſſions in *Wales*; "nor (by ſtatute 19 Geo. 3. c. 70. ſect. "5.) for the reverſing of any judgment, "given in any *inferior* court of record, "where the damages (that is, as it is "conceived, where the damages laid in "the declaration) are under 10l. unleſs "the perſon or perſons, in whoſe name "or names ſuch writ of error ſhall be "brought, with two ſufficient ſureties, "ſuch as the court wherein the judg-"ment is given ſhall allow of, ſhall firſt "be bound, unto the party for whom "the judgment is given, by recogni-"zance to be acknowledged in the ſame "court in double the ſum adjudged to "be recovered by the former judgment, "to proſecute the ſaid writ of error "with effect, and alſo to ſatisfy and "pay, if the ſaid judgment be affirmed "(or the writ of error *non-proſſed*. 19 "Geo. 3. c. 70. ſ. 5.) all and ſingular "the debts, damages and coſts, adjudged "upon the former judgment, and all "coſts and damages, to be awarded for "the delaying of execution." ante 72. c. d.

This ſtatute extends to all manner of judgments as well by default, on demurrer, or *nul tiel* record, as after verdict; but is confined to the particular actions mentioned in it; and therefore it is holden, that it does not extend to *actions upon the caſe* on bills of exchange, &c. 2 Keb. 234. *Vernat* v. *Debuſſe*. S. C. cited 1 Show. 15. or to actions of debt on bond conditioned for performance of covenants, 2 Bulſ. 54. *Gilling* v. *Baker*. S. C. cited 1 Show. 15. though one of the covenants be for the payment of money, and the action be brought for the non-performance of that covenant. Carth 28. *Gerard* v. *Danby*. S. C. 1 Show. 14. 2 Keb. 131. *Callwood* v. *Bullard*. S. P. or, for performance of an award. 2 Bulſ. 54. 1 Show. 15. or to debt upon an account ſtated. 2 Bulſt. 54. *Gilling* v. *Baker*. S. C.

Yelv.

Yelv. 227. 1 Show. 15. 7 Term Rep. 449. *Alexander* v. *Biſs*, or. to debt for work and labour, goods ſold and delivered, or money had and received, but only where it is brought on a ſpecific contract. 1 Boſ. & Pull. 249 *Ablett* v. *Ellis*. Or to debt on a general bond of indemnity. 1 Show. 14. but where a perſon, who had entered into a bond, as ſurety for another, to pay a ſum of money to a third perſon, took a counter-bond conditioned for payment of the money by the principal to ſuch third perſon by way of indemnity, the court held it to be a caſe within the ſtatute, and therefore bail was neceſſary. Com. Rep. 321. *Luddy* v. *Gifford*; and though *Parker* chief-juſtice, and *Powys* J. inclined to the contrary in *Hammond* v. *Webb*. 10 Mod 281 yet no judgment was given in it. Com. Rep. 323.

But bail was held not neceſſary in debt upon bond conditioned for the payment of ſuch beer as the plaintiff ſhould furniſh a third perſon with, not exceeding 100*l*. 2 Str. 1190. *Thrale* v. *Vaughan*. S. C. 1 Wilſ. 19. It was reſolved by all the judges, that bail is not requiſite in a writ of error brought upon a judgment obtained in an action of debt upon a prior judgment, 3 Burr. 1548. *Bidleſon* v. *Whytel*. S. C. 1 Black. Rep. 506, nor, as it ſeems, upon a judgment in an action of debt upon a recognizance of bail. 3 Burr. 1566. *Trinder* v. *Watſon*. S. P. Barnes, 194.

But bail is neceſſary in a writ of error on a judgment obtained in debt on bond conditioned for the payment of ſo much money as J. S. ſhould declare to be due on an account ſtated by him, for the action is in ſubſtance grounded upon a bond made for the payment of money only. 1 Lev. 117. *Dean of St. Paul's* v. *Capell*. So there muſt be bail in a writ of error on a judgment obtained on a bottomree-bond; for the contingency having happened, it is in every reſpect a bond for the payment of money only. 1 Str. 476. *Pitt* v. *Coney*. S. P 6 Mod. 38. *Scot* v. *Brace*. See however 1 Show. 14. *Garrett* v. *Danby*. S. L. Comb 105. See alſo 2 Str. 959. *Deſbordes* v. *Horſey*. S. P. Barnes, 8. *Woods* v. *Armſtrong*. 93. *Littleton* v. *Hanſon*.

And where a bond was given by a third perſon, as a ſecurity for the payment of a debtor's creditors fifteen ſhillings in the pound *by inſtalments*, upon a liquidated amount of his debts, the court held it to be a bond for the payment of money only, and therefore bail was requiſite in a writ of error on a judgment upon the bond. 2 Burr. 746. *Chauvet* v. *Alfray* but this caſe ſeems to be contrary to *Theale* v. *Vaughan*. 2 Str. 1190, above cited; and the ground of the deciſion, namely, that the 3 Jac. 1. c. 8. is a remedial law, and ought to be conſtrued liberally, appears to be over-ruled by the opinion of all the judges in a ſubſequent caſe, viz. *Bidleſon* v. *Whytel*, 3 Burr. 1545. above cited, who held that the ſtatute ought rather to be taken literally than extended. So where a judgment in C. B. is affirmed on a writ of error in the K. B., or a judgment in the K. B. is affirmed in the exchequer chamber, new bail muſt be given on bringing a writ of error in parliament, although bail was put in on the firſt writ of error. 1 Salk. 97. *Tilly* v. *Richardſon*. S. C. 2 Ld. Raym. 840. 7 Mod. 120. 1 Str. 527. *Colebrooke* v. *Diggs*. 8 Mod. 79. S. C.

The before-mentioned ſtatute was extended to other actions by ſtat. 13 Car. 2. ſt. 2. ſ. 9. by which it is enacted, "that no execution ſhall be ſtayed, in "any of the courts aforeſaid (that is, "the courts which are mentioned in the "ſtatute

" ſtatute 3 Jac 1. c. 8) by any writ " or writs of error, or ſuperſedeas there- " upon, *after verdict* and judgment, " in any action of debt grounded upon " the ſtatute 2 Edw. 6 for not ſetting " forth tithes, nor in any action upon " the caſe upon any promiſe for pay- " ment of money, actions ſur trover, ac- " tions of covenant, detinue, and treſ- " paſs, unleſs ſuch recognizance, and in " ſuch manner as by the ſaid act of " 3 Jac 1. is directed, ſhall be firſt ac- " knowledged in the court where the " judgment is given " And by ſtatute 16 & 17 Car 2. c. 8 ſ. 3. (made per- petual by ſtatute 22 & 23 Car. 2. c. 4.) " no execution ſhall be ſtayed in any of " the aforeſaid courts (thoſe mentioned " in 3 Jac. 1.) by writ of error, or ſu- " perſedeas thereupon *after verdict* and " judgment, *in any action perſonal what- " ſoever*, unleſs a recognizance, with " condition according to the ſtatute " 3 Jac. 1., ſhall be firſt acknowledged " in the court where ſuch judgment " ſhall be given: and further, that in " writs of error to be brought upon any " judgment after verdict in any writ of " dower, or in any action of *ejectione* " *firmæ*, no execution ſhall be ſtayed, " unleſs the plaintiff or plaintiffs in ſuch " writ of error ſhall be bound unto the " plaintiff in ſuch writ of dower, or action " of *ejectione firmæ*, in ſuch reaſonable " ſum as the court to which ſuch writ of " error ſhall be directed, ſhall think fit, " with condition, that if the judgment " ſhall be affirmed, or the writ of error " diſcontinued, in default of the plain- " tiff or plaintiffs therein, or the ſaid " plaintiff or plaintiffs be nonſuit in " ſuch writ of error, that then the ſaid " plaintiff or plaintiffs ſhall pay ſuch coſts, " damages, and ſum and ſums of money, " as ſhall be awarded upon, or after, ſuch " judgment affirmed, diſcontinuance, or " nonſuit " And by ſection 4. " that " the court wherein ſuch execution ought " to be granted upon ſuch affirmation, " diſcontinuance or nonſuit, ſhall iſſue a " writ to inquire as well of the meſne " profits as of the damages by any waſte " committed, after the firſt judgment in " dower or in *ejectione firmæ*; and upon " the return thereof, judgment ſhall be " given and execution awarded for ſuch " meſne profits and damages, and alſo for " coſts of ſuit. — Sect. 5. Provided that " the act ſhall not extend to any writ of " error to be brought by any executor " or adminiſtrator; nor unto any action " popular, nor unto any other action " brought upon any penal law or ſta- " tute, except actions of debt for not " ſetting forth tithes; nor to any in- " dictment, preſentment, inquiſition, " information, or appeal."

The two laſt mentioned ſtatutes are confined to judgments *after verdict*; and do not extend, like the ſtat. of 3 Jac. 1. c. 8. to judgments by default, upon de- murrer, or *nul tiel record*; therefore a writ of error upon a judgment by any of theſe three laſt ways is a *ſuperſedeas* without bail, in ſuch actions as are not enumerated by the ſtatute 3 Jac. 1.

If there is a verdict and judgment for the plaintiff in a *ſcire facias* againſt bail, and they bring a writ of error, there muſt be bail, for a *ſcire facias* is a *perſonal action* and therefore within the 16 & 17. c. 2. c. 8. 2 Bulſt. Rep. 122. *Pulteney* v. *Tothill*. And if an *executor* or *adminiſtrator*, being caſt on a judgment againſt him *in auter droit*, he muſt put in bail, unleſs where it would be required of other perſons. 1 Lev. 24. *Fitz-Harris* v. *More*. S. C. 1 Sid. 368. 2 Keb. 370, 371.

When the bail in error, if neceſſary,

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is complete, the next ſtep to be taken by the plaintiff in error, is to *certify* the record, in order to which a tranſcript ſhould be made, and ſent with the writ of error and returned into the court above. When no bail is required, this is the firſt ſtep that is taken, after the ſervice of the allowance of the writ of error. Tidd's Prac. K. B. 1119. 2d ed. And the plaintiff in error ſhould regularly cauſe the tranſcript to be made by the time the writ of error is returnable, for the defendant in error cannot tranſcribe the record. 1 Wilſ. 35. Anon. If the return be not certified by that time, the defendant in error may give the plaintiff in error *a rule* to certify it, and then if he will not, the defendant may non pros the writ of error. Caſ. temp. Hardw. 352. *Goodright* v. *Hugoſon.* See the form of the rule, Tidd's *Prac. Forms*, 481.

On a writ of error in the king's bench on a judgment in the common pleas, or other inferior court, in an adverſe ſuit, the record itſelf is ſuppoſed to be removed, that it may remain as a precedent, and evidence of the law, in ſimilar caſes. 2 Bac. Abr. 202. F. N. B. 45. F. 7th edit. But in the caſes of a fine the tranſcript only is removed. 1. H. 7. 20. a. F. N. B. 45, 46. 7th ed. 1 Salk. 337, 338. *Winchurch* v. *Belwood.* 341. *Fazacharly* v. *Baldo.* 1 Roll. Abr. 752. (P). pl. 1, 2, 3, 4. Dy. 89. b. This diſtinction however is not attended to in practice; for on all writs of error returnable in the king's bench, Cowp. 843. *Vicars* v. *Haydon.* 2 Roll. Rep. 233. *Maſon* v. *Denny*, as well as in the exchequer chamber, 2 Str. 837, *Rutter* v. *Redſtone.* Doug 352. *Lloyd* v. *Skutt*, note (3). 2 Ld. Raym. 1570, 1571. *Tully* v. *Sparkes*, or houſe of lords, 1 H 7. 19, 20. *Flourdew's* caſe. Dy. 375. a. Cro. Jac. 341, 342. *Haydon* v. *Godſalve*, S. C. 2 Bulſ. 163, 164. Sir T. Raym. 5. *Derbick* v. *Bradbourne*, it is uſual to ſend only a *tranſcript* of the record, and not the record itſelf.

The chief-juſtice of the common pleas generally ſigns the return, though it does not ſeem neceſſary; but he never ſeals it. 2 Str. 1063, 1064. *Blackwood* v. *South Sea Company.* Caſ. temp. Hardw. 344. S. C. When a writ of error is brought in parliament, on a judgment in the king's bench, the chief-juſtice goes in perſon into the houſe of lords, with the record itſelf and a tranſcript, which is examined and left there; and the record is brought back again into the king's bench, and if the judgment be affirmed, that court may grant execution itſelf. 1 Roll. Abr. 753. pl. 10. On a writ of error from the common pleas the chief-juſtice certifies only the body of the record; for the original and judicial writs remain with the officers, and are never certified but when error is aſſigned for want of them. Cro. Eliz. 84. *Robſert* v. *Andrews.*

After the tranſcript has been returned and filed, 1 Ld. Raym. 329. *Acourt* v. *Swift*, the plaintiff in error may in the *court above* move *to amend* the writ of error, or the defendant in error to quaſh it, or it may abate, or be diſcontinued. Great certainty was formerly required in making the writ of error agree with the record, and no defects therein were amendable; but now by ſtatute 5 Geo. 1. c. 13. "all writs "of error, wherein there ſhall be any "variance from the original record, or "other defect, may and ſhall be amend-"ed, and made agreeable to ſuch re-

"cord,

" cord, by the reſpective courts where " ſuch writs of error ſhall be return- " able." Since which it is become the practice to amend the writ of error, as a matter of courſe, without coſts. 2 Str. 863. Ibid. 902. *Gardner* v. *Merrett.* S. C. 2 Ld. Raym. 1587. As to caſes in which the court will amend, ſee 1 Str. 682, 683. *Lady Caſs* v. *Title.* 2 Str. 892. *Sword-blade Company* v. *Dempſey.* Cowp. 425. *Vereliſt* v. *Raſael.* Where judgment is ſigned in a term ſubſequent to that in which the writ of error was returnable, it is a fault not amendable by the ſtatute, for it would be to amend contrary to the truth of the caſe. 2 Str. 807. *Wright* v. *Canning.* S. C. 2 Ld. Raym. 1531.

Or the *defendant* in error may move to *quaſh* the writ, which in general is for ſome fault or defect that is not amendable by the above ſtatute: and ſuch application ſhould be made, either to the court of chancery, from whence it iſſues, or to the court wherein it is returnable. Doug. 350. *Lloyd* v. *Skutt.* We have already ſhewn, that where there are ſeveral parties, who are aggrieved by a judgment, and the writ is brought by ſome or one of them only, the court will quaſh it: but where one of ſeveral parties to a judgment, who is not aggrieved by it, joins in bringing a writ of error, it may be amended by ſtriking out his name, and will ſtand good for the other parties. 2 Str. 892. *Sword-blade Company* v. *Dempſey.* Cowp. 425. *Vereliſt* v. *Raſael.* And it may be quaſhed as to one judgment, and ſtand good for another; as where bail brought a writ of error as well on the judgment againſt the principal in the original action, as on the award of execution againſt them on a *ſcire facias*, the writ was quaſhed as to the judgment againſt the principal, becauſe the bail cannot have error on the judgment againſt him, and ſtood good as to the judgment againſt them on the *ſcire facias.* 1 Ld. Raym. 328. *Burr* v. *Attwood.* S.C. Carth. 447. Lill. Ent. 225. 290. Coſts are payable in all caſes on quaſhing a writ of error, even though none were recoverable in the original action. 1 Str. 262. *Archbiſhop of Dublin* v. *Dean of Dublin.* Ibid. 606. *Cowper* v. *Ginger.* 2 Str. 834. *Rejindoz* v. *Randolph.* Caſ. temp. Hardw. 137. *Ratcliff* v. *Burton:* it being enacted by ſtatute 4 Ann. c. 16. ſ. 25. " that upon quaſhing any writ of " error for variance from the original " record, or other defect, the defendant " in error ſhall recover againſt the plain- " tiff iſſuing out ſuch writ, his coſts, as " he ſhould have had if judgment had " been affirmed, and to be recovered " in the ſame manner;" which coſts include thoſe of quaſhing the writ of error. 2 Ld. Raym. 1403. *Ginger* v. *Cowper*; unleſs where the writ is quaſhed by reaſon of the defendant in error having entered continuances on the roll until the term ſubſequent to the return of the writ of error, and then ſigned judgment, whereby the writ, as we have already ſeen, becomes void; in which caſe the plaintiff is not liable to coſts on quaſhing it. 1 Str. 139. *Gould* v. *Coulthurſt*; but the court will make the defendant in error pay the coſts. 2 Str. 834. *Rejindoz* v. *Randolph.*

So a writ of error may *abate*; as where the plaintiff in error, or one of ſeveral plaintiffs in error, dies *before* errors aſſigned; in which caſe the defendant in error muſt ſue out a *ſcire facias quare executionem non* againſt the executors in the former caſe, and the ſur-

ſurvivors in the latter, to revive the judgment, before he can ſue out execution; for though in the latter caſe the death of one of the plaintiffs in error would have made no alteration of the record, if no writ of error had been ſued out, becauſe the executor of the deceaſed would not be liable to an execution by *fieri facias* or *capias ad ſatisfaciendum*, though he would to an *elegit*, yet a writ of error is a ſuperſedeas, which continues until the court is appriſed of the abatement of the writ by a *ſcire facias*. Yelv. 208. *Spencer* v *Rutland*. 1 Salk. 261. *Howard* v. *Pitt*. S. C. Carth. 256. 1 Ld. Raym 244. *Penoyer* v. *Brace*. S C. 1 Salk. 319. Carth 404. But if he die after errors aſſigned the writ does not abate, but the defendant may join in error, and proceed to have the judgment affirmed if not erroneous, and, where there was only one plaintiff in error, muſt afterwards revive it againſt his executors; but a writ of error does in no caſe abate by the death of the *defendant* in error whether before or after errors aſſigned; 1 Ld. Raym. 439. *Wicket* v. *Cremer*. S. C. 1 Salk. 264. Yelv. 113. *Bromley* v. *Littleton*. Ibid. 298. *Spencer* v. *Rutland*; or of one of ſeveral defendants in error; but his death being ſuggeſted on the roll, the writ of error proceeds againſt the ſurvivors: ſee the form of the ſuggeſtion, Lill Ent. 217. If he die before, and the plaintiff will not aſſign errors, the executors of the defendant in error, or the ſurviving defendant, may have a *ſcire facias quare executionem non* to compel him. 1 Salk. 264. *Wicket* v. *Creamer*. Barnes, 432. *Wright* v *Trewecke*. Tidd's Prac. K. B. 1128, 1129 .d edit.; or, if he die after, the executors, or ſurviving defendants, muſt proceed, as if the defendant were living, till judgment be affirmed, and then in caſe there was only one defendant in error, his executors muſt revive it by *ſcire facias*, but execution cannot be taken out pending the writ of error. Tidd's Prac K. B. 1129. 2d edit. And in order to compel the executors or adminiſtrators to join in error, the plaintiff may ſue out a *ſcire facias ad audiendum errores* againſt them. 1 Vent. 34. *Anon*. 1 Salk. 264. *Wicket* v. *Creamer*, either generally or by name, though the better way ſeems to be to ſue it out generally. 2 Bull. 230, 231. *Huxley* v. *Harriſon* The writ of error becomes ineffectual if the chief juſtice die before he has made his return; and the defendant in error may take out execution by leave of the court; but if he do it without, the execution is irregular. Barnes, 201. *Granborne* v *Quennel*. *Olorenſhaw* v. *Stanyforth*, and *Hayes* v. *Thornton*. If, however, the return be ſigned by the chief juſtice in his life time, the writ does not abate, but the record may be certified afterwards. 1 Sid. 268. *Allen* v. *Shaw*. Tidd's Prac. K. B. 1130. 2d edit.

A writ of error in the houſe of lords does not now determine by the *prorogation* of parliament, though formerly it was otherwiſe. 1 Vent. 266. Anon. 1 Lev. 165. *Prickard*'s caſe. 2 Lev. 93. *Goſton* v. *Sedgwick*; or even upon a *diſſolution*; but all appeals, and writs of error continue in the ſame ſtate they were then in. Sir T. Raym. 383, 384. Com. Dig. *Parliament*. (P. 2.)

So a writ of error may abate by the act of the party, as where it is brought by a feme-ſole, who afterwards marries, the writ abates *by her marriage*, and the court will give the defendant in error leave to take out execution, though ſhe and her huſband have brought a ſecond writ of error. 2 Str. 880. *Buller* v. *Pinna*.

v. *Pinna.* Ibid. 1015. *Jenkins* v. *Bates.* But bankruptcy is no abatement of a writ of error. 1 Term Rep. 463. *Kretchman* v. *Beyer.*

If the writ of error be not quaſhed or abated, the plaintiff in error ſhould, after the record is certified, forthwith proceed to aſſign his errors; and if he do not, the defendant in error in order to compel him, ſhould in the king's bench ſue out a writ of *ſcire facias quare executionem non.* 4 Burr. 1792. *Knox* v. *Caſtello.* 2 Term Rep. 17. *Sambidge* v. *Houſley.* 2 Leon. 107. pl. 135. See the form of the writ, Tidd's *Prac. Forms,* 425. 2 Leon. 107. pl. 135; and if, upon ſuch writ, the plaintiff in error does not aſſign errors, but ſuffers judgment to paſs by default upon *ſcire feci,* or two *nihils* returned, no errors aſſigned afterwards ſhall prevent execution 2 Bac. Abr. 216. Carth. 40, 41. *Moſely* v. *Cocks.*

And as the *ſcire facias* is only uſed as a method to compel an aſſignment of errors, the plaintiff in error is not permitted to plead to it. 2 Sell Prac 376; but if errors are aſſigned, before the expiration of the rule to appear to the *ſcire facias,* all further proceedings upon it are ſtayed.

But it frequently happens that the errors aſſigned are the want of an original writ, or warrant of attorney, or ſome other matter neceſſary to render the record perfect, or complete; which is termed "*alleging diminution*" of the record For if the judges of the common pleas, or other judges, upon a writ of error, do not certify all the record, the party that ſues the writ of error may allege diminution of the record, and pray a writ to the juſtices who certified the record before, to certify the whole of it. 2 Bac. Abr. 204. F. N. B. 57, 58. 7th edit. A man cannot allege diminution, contrary to the record which is certified, as if on a writ of error the judgment certified is, that the defendant ſhould be, "*in miſericordiâ,*" the defendant in error cannot allege for diminution, that the record is *quod capiatur,* becauſe it is contrary to the record certified. 2 Bac. Abr. 204. 1 Roll. Abr. 764. (L.) pl. 1, 2. Nor can diminution be alleged upon a writ of error brought on a judgment in an inferior court; 1 Sid. 40. *Redding*'s caſe, 147. *Smith* v *Smith,* 364. *Rex* v. *Knott.* 1. Salk. 266. *Hale* v. *Clare,* though it may be alleged in error upon a judgment in *Wales,* and counties-palatine. 1 Sid. 147. 364. for they are ſuperior courts. See 1 Saund. 73. *Peacock* v. *Bell.*

An *aſſignment* of error is in the nature of a *declaration,* and is either of error in *fact,* or error in *law.* The former conſiſt of matters of fact, not appearing on the face of the record, which if true, prove the judgment to have been erroneous; as that the defendant in the original action, being under age, appeared by attorney; that a *feme* plaintiff or defendant was under coverture, at the time of commencing the action; or that the plaintiff or defendant died before verdict or interlocutory judgment. See the form of aſſigning thoſe errors in fact and iſſues thereon, in Tidd's *Prac. Forms,* 485—490. An aſſignment of errors in fact muſt conclude with a verification; 1 Burr. 410. *Sheepſhanks* v. *Lucas.* Carth. 367. *Walker* v. *Stokoe*; and in aſſigning the death of the defendant in error before verdict, or interlocutory judgment, the aſſignment ought not to conclude in the common way, but by praying a *ſcire facias ad audiendum errores* againſt the executor or adminiſtrator of the defendant in

error.

error. See the form of ſuch an aſſignment, in Tidd's *Prac. Forms*, 487, 488. and if the ſheriff return that he is alive, then he may come in and plead *in nullo eſt erratum*. Carth. 339. *Edmonds* v. *Probert:* or his attorney may appear for him, and ſay that he is alive. 1 Sid. 93. *Dove* v. *Darcen*. Sir T. Raym. 59. S. C.: but if the ſheriff return, that he has warned the executor or adminiſtrator that will be a ſufficient ground for the court to proceed to examine errors. Carth. 339. *Edmonds* v. *Probert*.

Errors in *law* are common or ſpecial. The *common* errors are, that the declaration is inſufficient in law to maintain the action, and that the judgment was given for the plaintiff inſtead of the defendant, or *vice verſâ*. Tidd's Prac. K. B. 1141. and *Prac. Forms*, 490. 502. 507, 508. *Special* errors are the want of an original writ, bill or warrant of attorney, or other matter, appearing on the face of the record, which ſhews the judgment to have been erroneous. Tidd's Prac. K. B. 1141. Prac. Forms, 490, 491. 493. 503. The plaintiff may aſſign ſeveral errors in law, but only one error in fact. F. N. B. 45. E. 7th edit. and he cannot aſſign error in fact, and error in law together, for they are diſtinct things and require different trials. 2 Bac. Abr. 217. 2 Ld. Raym. 883. *Burdett* v. *Wheatly*. 1 Str. 439. *Jeffry* v. *Wood*. 1 Roll. Abr. 761. (E.) pl. 1. It ſeems to be a general rule, that nothing can be aſſigned for error that contradicts the record. 1 Roll Abr. 758. pl. 8. 1 Str. 684. *Helbut* v. *Held*. S. C. 2 Ld. Raym. 1414. 1 Wilſ. 85. *Bradburn* v. *Taylor*, 2 Bac. Abr. 217. Cro. Jac. 28. *Hudſon* v. *Banks*. 1 Lev. 76. *Molins* v. *Wetby*. Ibid. 310. 1 Salk. 262. *Lampton* v. *Colingwood*; or was for the advantage of party aſſigning it. 2 Bac. Abr. 220. 1 Str. 382. 8 Rep. 59. a. *Beecher*'s caſe. 5 Rep. 39. b. F. N. B 48. (F.) 7th edit. Ante, 46.; or that is aided by appearance, 1 Roll. Abr. 779. (L.) pl. 1, 2. Cro. Eliz. 582. *Thoroughgood* v. *Scroggs*; or by not being taken advantage of in due time. 1 Roll. Abr. 782. (P.) pl. 1. 8. 2 Bac. Abr. 221. 2 H. Black. 267. 299. *Lonſdale* v. *Littledale*. Thus a man ſhall never aſſign that for error, which he might have pleaded in abatement. So if a *feme-covert* bring an action in her own name by attorney, and the defendant pleads in bar to the action, he cannot afterwards aſſign the coverture for error. Carth. 124. *Coan* v. *Bowles*. So where the ſheriff who returns the panel was brother to him for whom the verdict paſſed, yet if the party does not challenge the array, it is no error. 1 Roll. Abr. 782. (Pl.) pl. 2. Bro. *Error*, 34. 2 Bac. Abr. 222. Where the aſſignment has been merely calculated for delay, the court have in ſome inſtances ſet it aſide 1 Str. 141. *Chartres* v. *Cuſaick*, 2 Str. 899 *Moore* v. *Goodright*. Lill. Ent. 228. in marg.

If the plaintiff aſſign for error the want of an original writ, bill or warrant of attorney, &c. or that it is bad in point of law, he ſhould regularly take out a *certiorari* to verify his errors. Tidd's Prac. K. B. 1142, 3. for it is a rule, that judgment cannot be reverſed for want of an original writ, bill or warrant of attorney, nor for any ſuppoſed error or defect therein, without a *certiorari* to bring ſuch original writ before the court; 9 Edw. 4. 32. b. Bro. Error, 90. S. C. 2 Ld. Raym. 1398.

Drewe

Drewe v. *Roſe*, Ibid. 1441. *Graddle* v. *Tyſon*. Caſ. temp Hardw. 118, 119. *Franklyn* and *Reeves*. Com. Rep. 115. *Sterling* v. *Tanner*. 2 Ld Raym. 1047. *Dowdeſwell* v. *Raſton*, ſee the forms of the *certiorari*, Tidd's *Prac. Forms*, 493. 494. 504, 505. Theſ. Brev. 68, 69, 70. 76. 2 Sell. Prac 415, 416.

The want of an original writ is aided *after verdict* by ſtatute 18 Eliz. c. 14. which has been extended, by an equitable conſtruction, to the want of a *bill* upon the file; Hob. 130. *Wilſon*'s caſe: Ibid 264. *Willis* v. *Woodhouſe*. Ibid 281, 282. Earl of *Clanrickard*'s caſe: but not after judgment by default or confeſſion, 4 Ann. c. 16. ſ. 2. or upon demurrer, or *nul tiel record*. Therefore, if the want of an original after verdict be aſſigned for error, the defendant in error may confeſs it, by pleading *in nullo eſt erratum*: but if a writ of error be brought after a judgment by default, &c. it is uſual for the defendant in error, if there be no original ſued out, to preſent a *petition* to the maſter of the rolls, praying that the curſitor of the county where the venue is laid, may be directed to iſſue an original with a proper return, which is ordered accordingly.—See the form of the petition, and *fiat* and order thereon, Tidd's *Prac. Forms*, 479, 480, 401. Sell. Prac. 418.

The plaintiff in error can have but one writ of *certiorari*, a ſecond writ being never granted to *reverſe*, though it may *to affirm* a judgment, 2 Str. 765. *Merryfield* v. *Berrey*. Ibid. 819. *Bowers* v *Mann*, S P. But if it be certified on the plaintiff's writ, that there is no original, or warrant of attorney, or one that is bad, or warrants not the declaration, *the defendant in error* may, at any time before in *nullo eſt erratum* pleaded, make a ſuggeſtion that there is an original writ or warrant of attorney, or a good one, of a different term, or even of the ſame term with the *placita*, and pray a *certiorari* for certifying it; and if a good original be returned, the court will not enquire when it was filed; or if a bad original was before certified, they will diſregard it, and apply the record to that which is good, and will ſupport the judgment. Cro. Car. 91. *Howell John* v *Thomas* Cro. Jac. 277 *Smith* v. *Skipwith*. 1 Salk. 266. *Burnaby* v. *Saunderſon*. 6 Mod. 174. S. C. 1 Roll. Abr. 765. pl. 8. Cro Jac. 130, 131. *Marham* v. *Peſcod*. Ibid. 597 *Johns* v. *Bowen*. Com. Rep. 118. 1 Salk. 267. *Burnaby* v. *Saunderſon*. 2 Ld. Raym. 1476. *Shipman* v. *Lethieuller*, Tidd's Prac. K. B. 1148, 1149. The plaintiff in error, after he has aſſigned his errors, may have a *ſcire facias ad audiendum errores* againſt the defendant, who thereupon may appear and plead *nullo eſt erratum*, or a releaſe, &c. 2 Bac. Abr. 707 However in practice it is uſual for the defendant in error by conſent, to take notice voluntarily of the aſſignment of errors; which conſent is teſtified by his pleading *in nullo eſt erratum*, and then there is no occaſion for a *ſcire facias ad audiendum errores*. Carth. 41. *Moſeley* v. *Cocks*.—See the form of the *ſcire facias*. Theſ. Brev. 229 231. 232. 2 Cromp. 354. Tidd's *Prac. Forms*, 495—497.

To an aſſignment of errors, the defendant may plead, or demur. Pleas in error are common, or ſpecial The *common* plea, or *joinder* as it is more frequently called, is, *in nullo eſt erratum*; which is in the nature of a demurrer,

and at once refers the matter of law ariſing thereon, to the judgment of the court. Tidd's Prac. K. B. 1150, 1151.

If an error in fact be well aſſigned, and the defendant in error would put in iſſue the truth of it, he ought to deny the fact, and join iſſue on it, and have it tried by the country, and not ſay *in nullo eſt erratum*; for by ſo doing he acknowledges the fact alleged to be true. 1 Roll. Abr. 763 (K.) pl. 2. Dyer 65. b. Sir T. Raym. 231. *Okeover* v. *Overbury*. 1 Lev. 294. *Grell* v. *Richards*. But if the defendant would acknowledge the fact to be as it is alleged, and yet inſiſt *that by law* it is no error, he ought to plead *in nullo eſt erratum*. 1 Roll. Abr. 763. (K.) pl. 3. But if an error be aſſigned that is not aſſignable, or be ill aſſigned, as that the court did not ſit, or the defendant did not appear, *in nullo eſt erratum* is no confeſſion, but ſhall be taken only for a demurrer. Sir T. Raym. 231. *Okeover* v. *Overbury*. 1 Lev. 311. *Cole* v. *Greene*. Cro. Jac. 521. *Haydon* v. *Mynn*. 1 Roll Abr. 758. pl. 8. Cro. Eliz. 665. *Croſs* v. *Tyrer*. *Pitzmar* v. *Webb*, cited in a note in 2 Ld Raym. 1415. Fitzgib. 109, 110. S. C. 2 Bac. Abr. 218.

If error be alleged in the body of the record, *in nullo eſt erratum* is a good plea; for it puts the matter to the judgment of the court, the record being agreed to be ſo. 1 Roll. Abr. 763. (K.) pl. 4. cites 9 Edw. 4. 32. b. which ſee S. C. Bro. Error, 93. So if error be alleged in a matter of record that is not of the body of the record, but in a collateral thing, as that there is no record of reſummons, *in nullo eſt erratum* is a good plea; for if the plaintiff in the writ of error does not, before the plea is entered, allege diminution and pray a *certiorari*, and procure a return from the inferior court that there is not any reſummons, the aſſignment is of no effect, but void, inaſmuch as that is to be tried by the record itſelf; and no diminution can be alleged, after the plea of *in nullo eſt erratum* pleaded; and though the defendant in error would confeſs the error, yet the court ought not to reverſe the judgment, until they are ſatisfied of the error by the record itſelf. 1 Roll. Abr. 764. pl. 5. which cites, alſo 9 Edw. 4. 32. b. S. C. Bro. Error, 93. If the plaintiff in error aſſigns error in fact and error in law, and the defendant in error pleads *in nullo eſt erratum*, it is a confeſſion of the error in fact, and the judgment muſt be reverſed; for he ſhould have demurred for the duplicity, upon which the judgment would have been affirmed. 2 Bac Abr. 218. Carth. 338, 339. *Edmonds* v. *Probert*. 2 Ld. Raym. 883. *Burdett* v. *Wheatley*. 1 Str. 49. *Jeffry* v. *Wood*. It is a general rule, that after the defendant in error has pleaded *in nullo eſt erratum*, no diminution can be alleged. Cro. Eliz. 84. *Robſert* v. *Andrews*, Moor. 700. *Pearſe* v *Beacher*. 1 Leon. 22. *Dayrel* and *Thinn*; and the reaſon is, becauſe it is admitted by all the parties, that it is a true and perfect record, and therefore neither party ſhall be permitted to contradict their own admiſſion. F. N. B. 58. note (*a*.) 7th edit. 1 Salk. 264. *Carlton* v. *Mortagh*. But no admiſſion of the parties can, or ought to reſtrain, the court from looking into the record before them. 1 Salk. 270. *Meredith* v. *Davies*. Therefore it is a general rule that, at any time pending a writ of error, whether before or after errors aſſigned, 1 Str. 440. *Bellew* v. *Scott*, or after

after *in nullo eſt erratum* pleaded, the court *ex officio* may award a *certiorari*. F. N. B. 58. note (a.) 1 Roll. Abr. 764. (M.) pl. 4. 1 Salk. 269. *Carlton* v. *Martagh*. 2 Ld. Raym. 1005. S. C. Caſ. temp. Hardw. 118, 119 *Franklyn* v. *Reeves*. 2 Bac. Abr. 205. 1 Salk. 270. *Mercdith* v. *Davies*.

When the plaintiff aſſigns for error the want of an original, or warrant of attorney, and the defendant comes in *gratis*, and confeſſes the matter aſſigned for error, by pleading *in nullo eſt erratum*, or a releaſe, without putting the plaintiff to the neceſſity of ſuing out a *certiorari* to verify his errors; the court, for their own information, may award this writ, in order if poſſible to ſupport the judgment. 2 Str. 907. *Berkley* v. *Howard*. 1 Salk. 268 *Carlton* v. *Mortagh*. 2 Ld. Raym. 1005. S. C. Tidd's Prac. K. B. 1153. 1154. So if error is aſſigned in the original writ, and upon a *certiorari* granted an erroneous original is returned, upon which *in nullo eſt erratum* is pleaded, and afterwards the court, *to inform their conſcience*, grants another *certiorari* for another original, and upon this a good original is returned, the court will intend this to be the original on which the judgment was given, and therefore ought to affirm the judgment. 1 Roll. Abr. 765. pl. 9. But though the court, *ad informandum conſcientiam curiæ*, will award a *certiorari* to affirm a judgment, they will never award one to reverſe it, or make error. 1 Salk. 269. *Carlton* v. *Mortagh*. 2 Str. 765. *Merryfield* v. *Berrey* Ibid. 819. *Bowers* v. *Mann*. Ibid. 907. *Berkley* v. *Howard*. Caſ. temp. Hardw. 118, 119. *Franklyn* v. *Reeves*.

Special pleas to an aſſignment of errors contain matters in confeſſion and avoidance, Tidd's Prac. K. B. 1154 as a releaſe of all errors, or of all ſuits. 2 Bac. Abr. 225, or the ſtatute 10 and 11 W. 3. c. 14. of limitations, namely, that the writ of error was not brought within twenty years after the ſigning of the judgment. 2 Str. 1055. *Street* v. *Hopkinſon*. Caſ. temp. Hard. 345. S. C. to which the plaintiff may reply, or demur, and proceed to trial or argument. Tidd's Prac. K. B. 1154. A releaſe of errors contained in a warrant of attorney to confeſs a judgment is good, though given before judgment, provided the releaſe be dated in the term of which the judgment is entered up. 2 Str. 1215. *Landon* v *Pickering*. But where there are ſeveral plaintiffs in error, the releaſe of one of them ſhall not bar the others. 6 Rep. 25 a. *Ruddock*'s caſe. Cro. Eliz. 648, 649. S. C. Cro. Jac. 116, 117. *Blunt* v. *Sneadſton*. 3 Mod. 135. *Hacket* v. *Herne*. In pleading a releaſe, the defendant muſt lay a venue; but though it be ill pleaded, yet if there are no errors, the court will affirm the judgment. 1 Salk. 268. *Carlton* v. *Mortagh*. S. C. 2 Ld. Raym. 1005. 6 Mod 206. 2 Bac. Abr. 225.

Iſſue being joined in error, the proceedings are *entered* of record. Tidd's Prac. K. B. 1156; and on a writ of error *coram nobis*, they muſt be entered on the *ſame* roll as the original judgment, or former writ of error, otherwiſe the whole would be diſcontinued, though after verdict. Cro. Eliz. 155. 281. *Yates* v. *Windham*. 1 Ld. Raym. 151. *Walker* v. *Stokoe*. Carth. 369. S. C. On a writ of error from the common pleas, the entry is made on different rolls, intitled of the term the tranſcript is brought in. Tidd's Prac. K. B. 1156; and begins with the writ of error and

return, after which the proceedings in the common pleas are entered to the end of the final judgment; then follows the aſſignment of errors; and if it be of errors in law there is an entry of the joinder, with a continuance of *curia adviſare vult*. See the form. poll. 102. *Holdipp* v. *Otway*. See alſo as to the forms, 2 Sell. Prac. 412—417. Tidd's *Prac. Forms*, 510—515; or if it be of errors in fact, the plea and replication, &c are next entered with an award of the *venire facias*. See the form, Tidd's *Prac. Forms*, 509, 510. and 1 Sup. K. B. 602—612. 4th edit.

The common *judgment* for the defendant in error, whether the errors aſſigned be in fact or in law, is, that the former judgment be *affirmed*. See Tidd's *Prac. Forms*, 525. 527. 531. So on a demurrer to an aſſignment of errors, in fact and in law, for duplicity, the judgment is that judgment be *affirmed*. Yelv. 58. *King* v. *Cooper*. 2 Ld Raym. 868. *Burdett* v. *Wheatley*. 1 Str. 429. *Duffy* v. *Wood*. For error *in fact*, the judgment is, that for the error aforeſaid the judgment aforeſaid *be recalled*, &c. 1 Roll. Abr. 805. pl. 9. and for error in law, it is that the ſaid judgment ſhall be *reverſed*. 2 Bac. Abr. 230: ſee Tidd's *Prac. Forms*, 526. On a plea of releaſe of errors found for the defendant, the judgment is that the plaintiff be *barred* of his writ of error, and not that the judgment be *affirmed*; for as the pleading of a releaſe is a confeſſion of errors, that would be to affirm an erroneous judgment; 1 Show. 50. *Kirle* v. *Cliſton*. 1 Str. 683. *Dent* v. *Lingood*. Ibid. 127. *Cunningham* v. *Houſton*; and though in the laſt caſe *Aſton*'s entries 339. were cited, where the entry is *quod judicium affirmetur*, yet the court paid no regard to it. And for the ſame reaſon on a plea of the ſtatute of limitations found for the defendant, the judgment is the ſame as where a releaſe is pleaded. 2 Str. 1055 *Street* v. *Hopkinſon*. S. C. Caſ. temp. Hardw. 3. 5.

A judgment, being an entire thing, cannot regularly be reverſed in part and affirmed for the reſidue. 1 Salk 24. *Cuting* v. *Williams*. S. C. 2 Ld. Raym 823. Carth 215. *Parker* v. *Harris*. 1 Ld. Raym. 255. *Richards* v. *Cornford*. 2 Bac. Abr. 227, 228. As where *ſeveral* damages were given on two iſſues, and an *entire judgment was entered for both*, and one of the iſſues was erroneous, the judgment was reverſed for the whole. Cro. Jac. 424. *Lloyd* v. *Pearſe*. So where A. brought an action on the caſe againſt B. for words ſpoken of him, and for cauſing him to be indicted, &c and the jury found a verdict for the plaintiff as to both, with *entire* damages, yet it being afterwards holden that the words were not actionable, the judgment was reverſed *in toto*. 2 Bac. Abr. 228. in marg.

Where there are ſeveral dependent judgments, and the principal one is reverſed the other cannot be ſupported; as if a man bring an action of debt upon a judgment, and recover, if the firſt judgment be reverſed, the ſecond judgment which is founded upon it muſt neceſſarily be reverſed too. 2 Bac. Abr. 229. But the reverſal of the laſt judgment will not affect the firſt: as if a judgment be given againſt *executors* in an action of *debt*, and, after a *ſcire facias*, judgment is given againſt them to have execution of their proper goods, and a writ of error is brought upon both judgments, in this caſe if the firſt judgment be good, and the laſt erroneous, the laſt only ſhall be reverſed, and the firſt ſhall ſtand. 1 Roll. Abr. 776. pl. 11. 5 Rep.

32 a. *Pettifer*'s caſe See the whole proceedings in the writ of error in this caſe. Co. Ent. 268. b.——— 272. a. S. P. 2 Str. 1055. *Street* v. *Hopkinſon*. Caſ. temp. Hardw. 345. S. C.

So if there be ſeveral diſtinct and independent judgments, the reverſal of one ſhall not affect the other; as in an action of account. if judgment be given *quod computet*, and afterwards auditors are aſſigned, and upon the account judgment is alſo given againſt the defendant with damages and coſts, and a writ of error is brought upon both judgments, and the laſt judgment only is found erroneous, in this caſe the laſt judgment only ſhall be reverſed, and not the firſt, but that ſhall ſtand in force, for they are two diſtinct and perfect judgments, for the firſt judgment is *ideo conſideratum eſt quod computet, et defendens in miſericordia*. 1 Roll. Abr. 776. pl 11. So if the judgment conſiſts of ſeveral diſtinct and independent parts, it may be reverſed as to one part only; as for coſts alone. 1 Str. 118. *Pellew* v. *Aylmer*. 2 Ld. Raym. 873. *Green* v. *Walker*. S. C. cited. 2 Ld. Raym. 1534. or damages in *ſcire facias*. 2 Str. 808. *Henriques* v. *Dutch Weſt India Company*. 2 Ld Raym. 1532. S. C. or for damages and coſts in a *qui tam* action. 4 Burr. 2018. *Frederick* v. *Lookup*.

If judgment be given for the plaintiff, and *the defendant* bring a writ of error upon which the judgment is reverſed, there judgment ſhall only be to reverſe the former judgment; for the writ of error is brought only to be caſed and diſcharged from that judgment. But if judgment be given for the defendant, and *the plaintiff* bring a writ of error, the judgment ſhall not only be reverſed, but the court ſhall alſo give ſuch judgment as the court below ſhould have given: for the writ of error is to revive the firſt cauſe of action, and to recover what he ought to have recovered by the firſt ſuit, in which the erroneous judgment was given. 1 Salk. 262. *Parker* v. *Harris*. 1 Roll. Abr. 674. pl. 1, 2. 3. poſt. 256, 257. *Green* v. *Cole*. Carth. 254. *Baker* v. *Lade*. 4 Burr. 2156. *Clements* v. *Walker*. If judgment be given for the plaintiff on one count in a declaration, and a diſtinct judgment for the defendant on another, and the defendant bring a writ of error to reverſe the judgment on the firſt count, the court of error cannot examine the legality of the judgment on the ſecond count, no error being aſſigned on that part of the record. 6 Term Rep. 200. *Campbell* v. *French*.

Where a judgment againſt the plaintiff is reverſed, on a writ of error brought in the king's bench, that court, having the record before them, may in all caſes give ſuch a judgment as the court below ſhould have given, and, if neceſſary, may award a writ of inquiry to aſſeſs the damages. And ſo where a judgment is given againſt the plaintiff in the king's bench on *a ſpecial verdict*, by which the damages are aſſeſſed, the exchequer chamber or houſe of lords, may in caſe of reverſal, give a new and complete judgment for the plaintiff to recover the damages. But where the damages are not aſſeſſed, as when judgment is given on *demurrer*, the exchequer chamber or houſe of lords, not having the record before them, but only a tranſcript, cannot give a new and complete judgment, but only an interlocutory one *quod recuperet*, and the tranſcript being remitted, the court of king's

bench will award a writ of inquiry, and give final judgment. 1 Salk. 403. *Phillips* v. *Berry*. S. C. 1 Ld. Raym. 910. Carth. 319 Skin. 514. Cro. Jac. 206 *Faldowe* v. *Ridge*. S. C. Yelv. 75.

When the judgment is affirmed, or writ of error *non-proſſed*, the defendant in error is entitled to *damages* and *coſts* by the ſtatutes 5 H. 7. c. 10. and 19. H. 7. c. 20. By the former of theſe ſtatutes, reciting that writs of error were often brought for delay, it is enacted, "that if any defendant or tenant, againſt "whom judgment is given, or any other, "that ſhall be bound by the ſaid judg-"ment, ſue, *before execution had*, any "writ of error to reverſe any ſuch judg-"ment, in delay of execution, that then "if the ſame judgment be affirmed, or "the writ of error be diſcontinued, in "default of the party, or the plaintiff "in error be nonſuited therein, the per-"ſon or perſons, againſt whom the writ "of error is ſued ſhall recover his coſts "and damages, for his delay and wrong-"ful vexation in the ſame, by the diſ-"cretion of the *juſtices* (that is, the "*court*. Doug. 501. n. 5) before "whom the writ of error is ſued." The latter of the above ſtatutes recites the former, and that it had not been put in force, and enacts, "that it ſhall be "thenceforth duly put in execution." It has been holden, that theſe ſtatutes do not extend to a writ of error ſued out *after execution ſerved*, becauſe it is not in delay of execution. Cro. Jac. 636. *Eardley* v. *Tarnock*. Gilb. C. P. 275. And that damages and coſts ſhall be given *in error*, for delay of execution, although none were recoverable in the firſt action, Cro. Eliz. 617. *Graves* v. *Short*; coſts being allowable in every caſe where a writ of error is brought before execution executed. Ibid. 659. *Penruddock* v. *Clerk*. Cro. Car. 145. Anon. 1 Sid. 262. *Archbiſhop of Dublin* v. *Dean of Dublin*. 2 Str 1084. *Ferguſon* v. *Rawlinſon*. S. C. Andr. 113. S. C. cited 6 Vin. 337. pl. 9. in marg. and 338 pl. 12. in marg. and the court over ruled Cro. Car. 425. *Smith* v. *Smith*. Sir T. Raym. 134. *Winne* v. *Lloyd*. S. C. 1 Lev. 146. and 1 Vent. 88. *Foot* v *Perkly*, which were cited to the contrary. And where an executor brought an error on a judgment *after a devaſtavit*, the court held that he ought to pay coſts on affirmance. 2 Str. 977. *Caſwell* v. *Norman*. S. C. 2 Barnard. K. B. 450. On a writ of error returnable in the king's bench, that court, on motion, will order the maſter to compute *intereſt* on the ſum recovered, by way of damages, from the day of ſigning final judgment below down to the time of affirmance, and to add the ſame to the coſts taxed for the plaintiff in the original action. Doug. 752. *Zinck* v. *Langton*. note 3. and ſee 2 Str. 971. *Biſhop of London* v. *Mercers' Company*. 2 Burr. 1096, 1097. *Boddy* v. *Kellary*. S. C. 1 Blac. Rep. 267. 2 Term Rep. 79. *Entwiſtle* v *Shepherd* And if by the courſe of the court of error, intereſt is not computed in the allowance of coſts, on the affirmance of the judgment, the jury may give intereſt by way of damages from the time of ſigning the original judgment 2 Term Rep. 79. *Entwiſtle* v *Shepherd* But in debt on a recognizance againſt bail in error in the exchequer chamber, the bail are not liable to pay intereſt between the time of the original judgment and affirmance; tho' they are liable to intereſt from the time of the affirmance. 4 Burr. 2127. *Welford* v. *Davidſon*. 2 Term Rep. 57. *Frith* v. *Leroux*. In the exchequer-chamber

chamber the officer is bound to allow double coſts to the defendant in error on the affirmance of a judgment; but it is a matter entirely in the diſcretion of the court to allow *intereſt* on the affirmance. 2 H. Blac. 284. *Shepherd* v. *Macreth*. In the court holden before the lord chancellor and treaſurer and judges (under the 31 Edw. 3.) for examining erroneous judgments given in the court of exchequer, the practice is to give intereſt from the day of ſigning judgment to the day of affirming it there, computed according to the current, and not the ſtrictly legal, rate of intereſt. 2 Burr. 1097. *Bodily* v. *Bellamy*. In the houſe of lords, ſometimes very large, ſometimes very ſmall coſts are given, according to the nature of the caſe, and the reaſonableneſs or unreaſonableneſs of litigating the judgment of the court below. Ibid. And in order to mitigate coſts, the plaintiff will ſometimes withdraw his errors. Tidd's Prac. K. B. 1169.

By ſtatute 13 Car. 2. ſt. 2. c. 2. ſect. 10. if any perſon ſhall proſecute any writ of error, for reverſal of any judgment given *after verdict*, and the judgment ſhall be affirmed, he ſhall pay unto the defendant in the ſaid writ of error, his double coſts. And by ſtatute 8 and 9 W. 3. c. 11. ſ. 2. "If at any time after judgment "given for the *defendant*, in any action, "plaint, or ſuit, in any court of record, "the plaintiff or demandant ſhall ſue "any writ of error, to annul the "ſaid judgment, and the ſaid judg-"ment ſhall be afterwards affirmed, the "writ of error diſcontinued, or the "plaintiff be nonſuit thereon, the de-"fendant in error ſhall have judgment "to recover his coſts againſt the plain-"tiff or demandant, and have execu-"tion for the ſame by *capias ad ſatis-"faciendum*, *fieri facias* or *elegit*." But none of the before mentioned ſtatutes gives coſts upon the *reverſal* of a judgment; and therefore when a judgment is reverſed, each party muſt pay his own coſts. 1 Str. 617. *Wyvil* v. *Stapleton*.

After affirmance, or *non-proſs* for not aſſigning errors, the defendant in error may take out *execution* for the ſum recovered in the original action, as well as the damages and coſts in error, or for theſe alone, by *fieri facias*, *elegit*, or *capias ad ſatisfaciendum*. See the form of the *fieri facias*. Lill. Ent. 583. 588. Theſ. Brev. 117, 118. 122. Tidd's *Prac. Forms*. 534—539; of the *elegit*, Lill. Ent. 571. Theſ. Brev. 97.; and of the *capias ad ſatisfaciendum*, Theſ. Brev. 42, 43. et. 53, 54. Lill. Ent. 544, 545. Tidd's *Prac. Forms*, 539, 540.

An execution, being founded on the record, muſt iſſue out of the court where the record is; and therefore where the judgment is affirmed on a writ of error *coram nobis*, or from the common pleas, or an inferior court, returnable in the king's bench, the record remaining there, or being ſuppoſed to be removed thither, the execution may iſſue immediately out of that court. Cowp. 843. *Vicars* v. *Haydon*. Tidd's Prac. K. B. 1171. But where a judgment is affirmed in the exchequer chamber, or houſe of lords, to which a tranſcript only is removed, it is neceſſary that the tranſcript ſhould be *remitted* to the king's bench where the record is and out of which the execution muſt iſſue, before the iſſuing thereof, or at leaſt before it is returnable. Palm. 186, 187. *Potter*

v. *Turner*. Cowp. 843. Tidd's Prac. K. B. 1171. See the entry of the *remittitur* of proceedings to the king's bench after affirmance in the exchequer chamber; Tidd's *Prac. Forms*, 528, and the like after affirmance in the houſe of lords. Ibid. 532, 533.

If judgment be *reverſed*, the party ſhall be reſtored to all that he has loſt by occaſion of the judgment, and a writ of reſtitution ſhall be awarded. Cro. Jac. 699. *Sympſon* v. *Juxon*. Where the plaintiff has execution and the money is levied and paid, and that judgment is afterwards reverſed, the party ſhall have reſtitution without a *ſcire facia*, becauſe it appears on the record that the money is paid, and there is a certainty of what was loſt; otherwiſe where it was levied but not paid; for there muſt then be a *ſcire facias* ſuggeſting the matter of fact, viz. the ſum levied &c. 2 Salk. 588. *Anon*. See the form of a *ſcire facias quare reſtitutionem non*. Lill. Ent. 641. 650. Tidd's *Prac. Forms*, 541, 542 and ſee the form of a writ of reſtitution after judgment reverſed. Tidd's *Prac. Forms*, 543, 544.

(2) So in *Full* v. *Steward*, 1 Wilſ. 255. which was an action for an eſcape on meſne proceſs out of an inferior court againſt the bailiff, it was holden that the defendant could not take advantage of any error in the proceſs below, of which the defendant below might have availed himſelf. And in *Bently* v. *Donely*, 8 Term Rep. 7. in an action on the caſe for reſcuing a debtor taken upon meſne proceſs ſued out of the palace court, it was decided that it was not a ſufficient ground to arreſt the judgment, that it was not alleged that the cauſe of action in the inferior court aroſe within the juriſdiction, or that it was not alleged that the party below did not appear at the return of the writ. S P. Cro. Eliz. 165. *Oſnell* v *Paſton*. Cro. Jac. 3. *Weaver* v. *Clifford*. 280 *Mackaley*'s caſe, 288, 289. *Burton* v. *Eyre*. Dalt. Sher. 563 for as on the one hand an erroneous proceſs is a ſufficient juſtification to the ſheriff in an action of falſe impriſonment brought againſt him for arreſting and impriſoning the party under it, for the ſheriff is not to examine the legality of it; ſo on the other hand the ſheriff cannot, to an action againſt him for the eſcape of a perſon arreſted by him under an erroneous proceſs, take advantage of the error in the proceſs to deliver himſelf from being anſwerable for the eſcape. And where in debt againſt the ſheriff for the eſcape of one in execution, the declaration very unneceſſarily ſtated that A. obtained judgment in K. B. againſt B. and then died inteſtate, and the plaintiff took out adminiſtration by an inferior ordinary, namely, the arch-deacon of B. and brought a *ſcire facias* upon that judgment, upon which he had judgment to have execution, and thereupon a *capias ad ſatisfaciendum* iſſued againſt B. upon which he was taken, and in cuſtody of the defendant, who was ſheriff, &c. and afterwards eſcaped; and upon *nil debet* pleaded and a verdict for the plaintiff, it was moved in arreſt of judgment that it appeared in the declaration, upon the plaintiff's own ſhewing, that the adminiſtration was granted by a peculiar juriſdiction, whereas it likewiſe appeared that the inteſtate had *bona notabilia* in another dioceſe, namely, the judgment at *Weſtminſter*; for which reaſon the adminiſtration granted by a peculiar

liar juriſdiction by the archdeacon, was merely void; and if ſo, then the judgment obtained upon the *ſcire facias* was utterly void; and then an action of eſcape would not lie againſt the ſheriff for the eſcape of a priſoner taken upon a void judgment; for if there were no judgment againſt B. there was no cauſe to detain him in priſon. To which it was anſwered and ſo reſolved, *that it was only error*, of which the ſheriff could not take advantage in an action for an eſcape brought againſt him; and the difference was where the judgment was merely void, or where it was only erroneous; and that depended on another diſtinction, namely, where the court in which the judgment was obtained had cognizance of the cauſe, and where not; for in the firſt caſe, if the plaintiff obtain a judgment, and by his own ſhewing had no cauſe of action, yet becauſe the court had juriſdiction of the cauſe, this is only an erroneous and not a void judgment; but it is otherwiſe where the court had no juriſdiction of the cauſe; but in the preſent cauſe the court had cognizance of the cauſe, and therefore the matter was only error. Carth. 148. *Gold* v. *Strode*. 3 Mod. 324. S. C.

Holdipp *verſus* Otway.

Caſe 18.

Trin. 21 Car. II. Regis. Rot. 1161.

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Writ of error from the common pleas to the king's bench.

OUR lord the king has ſent, to his beloved and truſty Sir *John Vaughan* knt., his chief juſtice of the bench, his writ cloſe, in theſe words, to wit; *Charles* the ſecond, by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. to our beloved and truſty Sir *John Vaughan* knt., our chief juſtice of the bench, greeting; becauſe in the record and proceedings, and alſo in the giving of judgment, in a plaint which was in our court before Sir *Orlando Bridgman* knight and baronet and his companions, then our juſtices of the bench, by our writ between *John Otway* eſq. and *Henry Holdipp*, late of *Overton* in the county of *Southampton*, executor of the will of *Cornelius Dowſe* gent., lately called *Cornelius Dowſe* of *Overton* in the county of *Southampton*, for that the ſaid *Henry* ſhould render to the ſaid *John* 68l., as it is ſaid, manifeſt error hath intervened, to the great damage of the ſaid *Henry*, as by his complaint we are informed: we being willing that the error, if any there be, ſhould in due manner be corrected, and full and

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and ſpeedy juſtice done to the parties aforeſaid in this behalf, do command you, that if judgment be thereupon given, then you ſend to us diſtinctly and openly, under your ſeal, the record and proceedings aforeſaid, with all things concerning the ſame, and this writ, ſo that we may have them in 15 days from the day of St. *Martin*, whereſoever we ſhall then be in *England*, that the record and proceedings aforeſaid being inſpected, we may cauſe to be further done thereupon, for correcting that error, what of right, and according to the law and cuſtom of *England*, ought to be done. Witneſs ourſelf at *Weſtminſter*, the 18th day of *November*, in the 20th year of our reign.

Shelberry.

The chief juſtice's return.

The anſwer of Sir *John Vaughan* knt., the chief juſtice within named.—The record and proceedings of the plaint, whereof mention is within made, with all things concerning the ſame, I ſend to our lord the king whereſoever, &c. at the day within contained, in a certain record to this writ annexed, as within I am commanded.

Pleas at *Weſtminſter* before Sir *Orlando Bridgman* knight and baronet and his companions, juſtices of our lord the king of the bench, of the term of the holy Trinity, in the 19th year of the reign of our lord *Charles* the ſecond, by the grace of God of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. Roll. 792.

Debt upon a bill obligatory.

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London to wit, *Henry Holdipp*, late of *Overton* in the county of *Southampton* gent., executor of the will of *Cornelius Dowſe* gent. lately called *Cornelius Dowſe* of *Overton*, in the county of *Southampton*, was ſummoned to anſwer *John Otway* eſq. of a plea, that he render to him 68l. which he unjuſtly detains from him, &c. And whereupon the ſaid *John*, by *Richard Buckett* his attorney, ſays, that whereas the ſaid *Cornelius* in his life-time, to wit, on the 24th day of *November*, in the year of our Lord 1650, at *London*, in the pariſh of St. *Botolph*, *Biſhopgate*, within the ward of *Biſhopgate*, by his certain bill, which, ſealed with the ſeal of the ſaid *Cornelius*, the ſaid *John* brings here into court, the date whereof is the ſame day and year aforeſaid, acknowleged himſelf to owe and be indebted to the ſaid *John* in the ſaid ſum

ſum of 68l. which ſaid ſum of 68l. the ſaid *Cornelius* by the ſaid bill covenanted and agreed to pay to the ſaid *John* and his aſſigns, as ſoon as ſeveral bills of charges of the ſaid *Cornelius* expended in proſecuting ſeveral ſuits at law and in equity for Mr. *Robert Riggs* of *Fareham* in the county aforeſaid deceaſed, and for *Margery Riggs* late of *Wincheſter* in the ſaid county, widow, deceaſed, ſhould be audited, debated and ſettled by two attornies indifferently to be choſen by both parties, to examine and ſtate the account of the ſaid bills of charges, the ſaid *John Otway* ſatisfying and paying the ſaid *Cornelius* his proportionable part, namely, one third part of the ſaid bills to be in form aforeſaid debated and ſettled, as by the ſaid bill more fully appears. And the ſaid *John Otway*, proteſting (1) that he the ſaid *John* from the time

(1) A proteſtation is defined to be, a ſaving to the party who takes it from being concluded by any matter alleged, or objected againſt him on the other ſide, *upon which he cannot take iſſue*. Plow. 276. b. *Grayſbrook* v. *Fox*. Finch L. 359. 366. Or, as expreſſed by Lord *Coke*, it is a ſafeguard, which keeps the party from being concluded by the plea he is to make, *if the iſſue be found for him*. Co. Lit. 124. b. Doc. Plac. 275. And it is of *two ſorts*; firſt, when a man pleads any thing which he dares not directly affirm, or cannot plead for fear of making his plea double; as if, in conveying to himſelf by his plea a title to land, the defendant ought to plead divers deſcents from ſeveral perſons, but dares not affirm that they were all ſeiſed at the time of their death; or, although he could do ſo, it would make his plea double to allege *two deſcents*, when *one* deſcent would be a ſufficient bar; then the defendant ought to plead and allege the matter, interlacing the word "proteſting," thus, *proteſting that ſuch a one died ſeiſed*, &c. and *this* the adverſe party cannot traverſe. The other ſort of proteſtation is, when a perſon is to anſwer two matters, and yet by law he can only plead to one of them, then in the beginning of his plea he may ſay, *proteſting, or not acknowledging ſuch part* of the matter to be true, and adds, "*but* "*for plea in this behalf*, &c." and ſo take iſſue, or traverſe, or plead to the other part of the matter; and by this means he is not concluded by any of the reſt of the matter which he has by proteſtation ſo denied, but may at another time take iſſue upon it. Reg. Plac. 70, 71. The proper place in the plea for the proteſtation, according to the uſual and regular form of pleading, is after the words, "*that the (plaintiff)* "*ought not to have his action aforeſaid* "*maintained againſt him.*" Plow 276. b. *Grayſbrook* v. *Fox*. A proteſtation may be taken in a *replication*; as where in

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time of making the bill aforeſaid hitherto was and yet is ready to perform all things on the part of him the ſaid *John Otway* by the bill aforeſaid to be performed, and proteſting that there was not, from the time of making the ſaid bill, any ſum of money due to the ſaid *Cornelius* upon any bill of charges by him expended in proſecuting any ſuits at law or in equity for the ſaid

in *aſſumpſit* for work and labour, and an *inſimul computaſſet* for 5*l.* to pay when he ſhould be thereto required, the defendant pleads, that it was agreed between him and the plaintiff, that the defendant ſhould give, and the plaintiff ſhould accept, a *bill* of 5*l.* in ſatisfaction of what was due to him, and that he did accept ſuch bill according to the ſaid agreement; and the plaintiff replies, *proteſting* that he made no ſuch agreement, *proteſting alſo*, that there was no ſuch bill given, for plea ſays, that it was *not* under ſeal; this replication is good. 5 Mod. 136. *Taylor* v. *Baker*. However though a proteſtation may be taken in a replication, yet it is doubtful whether the proteſtations were properly taken in the laſt mentioned caſe; for they ſeem to be repugnant to the plea which admits the agreement and the giving of the bill in ſatisfaction; and a proteſtation that is repugnant to, or inconſiſtent with, the plea is holden not to be good. Bro. *Proteſtation*, 1. 5. Plow. 276. *Grayſbrook* v. *Fox*. As where to an appeal of *Mayhem*, the defendant takes by proteſtation that if the plaintiff had any hurt or mayhem, it was from his own aſſault, and pleads that he was not mayhemed, nor had any mayhem, the proteſtation is bad for repugnancy to the plea. Feilw. 95. a. 3 P. Cro. Eliz. 815. *Southcot* v. *Bennet*. Plow. 48. a. So an *idle* and *ſuperfluous* proteſtation is not good; as where in an action by the executor of A. the defendant makes proteſtation that A. did not make a will, and alſo that A. did not make the plaintiff executor, the 2d proteſtation that A. did not make the plaintiff executor is ſuperfluous; for if he made no will, it is included that he did not make the plaintiff executor. Plow. 276. *Grayſbrook* v. *Fox*. But it is holden that a ſuperfluous or repugnant proteſtation does not vitiate the plea, though it be ſhewn for cauſe of demurrer; for the intent of the proteſtation is that the party may not be concluded *in another action*. Com. Dig. Pleader, (N.) And indeed the ground of the deciſion in the before mentioned caſe of *Taylor* v. *Baker* was, that a note or bill given in ſatisfaction, if it be not under ſeal, is not good. See Com. Dig. Pleader, (2. 10.) therefore it was unneceſſary for the court to give any opinion upon the propriety or formality of the proteſtations. In like manner, that, which is *the ground of the party's ſuit*, cannot be taken by proteſtation, for it may be denied by anſwer, and iſſue may be joined upon it; as in detinue by the executor of A., the defendant cannot take by proteſtation that A. did not make the plaintiff his executor, for it is the ground of the ſuit, and utterly deſtroys

ſaid *Robert Riggs*, or the ſaid *Margery Riggs* deceaſed, the ſaid *John Otway* in fact ſays that neither the ſaid *Cornelius* in his life-time, nor the ſaid *Henry*, after the death of the ſaid *Cornelius*, produced or ſhewed, nor did either of them produce or ſhew, any bill or bills of charges of the ſaid *Cornelius* expended in proſecuting any ſuits at law, or in equity,

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deſtroys the plaintiff's action; and that which is the effect of the party's ſuit cannot be taken by proteſtation. Plow. 276. *Grayſbrook* v. *Fox*. Doc. Plac. 296. So where in an action upon the caſe, the plaintiff declared that the cuſtom of the pariſh was that the parſon ſhould keep a bull and boar, and that the defendant was parſon and the plaintiff an inhabitant of the pariſh, and the defendant had not kept a bull or boar, &c: the defendant *took the cuſtom by proteſtation*, and pleaded not guilty; the court held, that the proteſtation to the cuſtom was not good, becauſe it was the ground and ſubſtance of the action, according to *Grayſbrook* v. *Fox*. Moor. 355, 356. *Yelding* v. *Fay*. So where an information was brought againſt the inhabitants of the county of M. for not repairing L. bridge, which by the information was alleged to be an ancient bridge, and time out of mind had been repaired by the inhabitants of the county: the defendants proteſting, that it was not an ancient bridge, for plea ſaid, that it was lately erected by the king for the benefit of his mills: and upon demurrer the court held that for this cauſe, and alſo becauſe the defendants did not ſhew who was bound to repair it, the plea was ill. Cro. Car. 365. Caſe of *Langforth* bridge. See alſo 3 Wilſ. 109, 110. 116. *Godfrey* v. *Saunders*. A proteſtation is perfectly inoperative in the pleading in which it is uſed, it neither admitting, nor denying any thing in that ſuit.

Where one pleads a plea, and takes another matter by proteſtation, and the iſſue is found *againſt him*, the proteſtation is of no ſervice. Bro. *Proteſtation*, 14. it being a rule, that a proteſtation does not avail the party that takes it, if the iſſue be found *againſt him*; but only prevents a concluſion, where the iſſue is found *for him*, unleſs it be a matter which *cannot be pleaded*. Finch L. 250. or on which *iſſue cannot be joined*. Plow. 276. b. *Grayſbrook* v. *Fox*. Co. Litt. 124. b. As where in an action by a villain againſt his lord, the lord makes proteſtation that he is his villain, and pleads another matter in bar; and if they are at iſſue, and it be found *for* the lord, there the villain continues a villain as before; but if the iſſue be found for the villain, then he is free, becauſe the lord took not at the beginning *for his plea*, that the villain was his villain, but took it *by proteſtation*. The lord might have pleaded, that he was his villain, and iſſue might have been joined thereupon. Litt. ſect. 193.

But where the matter *cannot be pleaded*, or *iſſue taken thereupon*, it ſhall be ſaved to the party proteſting, though the iſſue be found *againſt him*. As where

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equity, for the ſaid *Robert Riggs*, or *Margery Riggs*, to be audited, debated and ſettled according to the tenor of the ſaid bill; whereby an action accrued to the ſaid *John* to have and demand of the ſaid *Cornelius* in his life-time, and of the ſaid *Henry* after the death of the *Cornelius*, the ſaid 68l. Yet the ſaid *Cornelius* in his life-time, and the ſaid *Henry* after the death of the ſaid *Cornelius*, (although often requeſted,) have not, nor hath either of them, rendered the ſaid 68l. to the ſaid *John*, but to render the ſame to him have hitherto refuſed, and the ſaid *Henry* ſtill refuſes to render the ſame to him, and unjuſtly detains the ſame; wherefore he ſays that he is worſe and has damage to the value of 5cl., and therefore he brings ſuit, &c.

Judgment by default for the debt and 5cl. damages for the detention of the debt,

And the ſaid *Henry*, by *Edward Noel* his attorney, comes and defends the wrong and injury when, &c. and ſays nothing in bar, or preclusion of the ſaid action of the ſaid *John*: wherefore the ſaid *John* remains againſt the ſaid *Henry* therein undefended. Therefore it is conſidered that the ſaid

an infant brings an action of waſte againſt his guardian, and appears by attorney, which no one, unleſs he be of full age, ſhould do, if the guardian takes the *nonage* by proteſtation, it ſhall ſave him the wardſhip, *becauſe he cannot plead it*. Finch L. 359. Bro. *Proteſtation*, 21. So in an information the defendant ſhall take by proteſtation, that it is inſufficient in law. Plow 1. *Reginer* v *Fogeſſa*. So where in treſpaſs the plaintiff gives a name or quantity in his writ and declaration, as that the defendant broke his cloſe, viz. 20 or 30 acres of land, &c. the defendant cannot vary or give another name, or quantity, but muſt ſay by proteſtation, that the land is called B., or that it contains another quantity, and for plea that the place is his freehold. Bro. *Proteſtation*, 12. *Treſpaſs*, 366. So in a *quare impedit* by the king for the heir in ward, becauſe A. the anceſtor was ſeiſed and preſented, and conveyed from A. to B. and from B. to C., and from C. to the heir, the defendant pleaded that no ſuch B. ever was *in rerum natura*; but the plea was diſallowed, becauſe as the title is from *A.*, and *B.* is only in the meſne conveyance, and not the perſon in whom the preſentation is alleged, the plea is not material; but the defendant, to prevent concluſion afterwards, may take it by proteſtation. Bro. *Proteſtation*, 22. But where a man makes proteſtation of a thing that is material, and the iſſue is found *againſt* him, he ſhall be concluded of all that is material in the record: for, as we have already in ſubſtance obſerved, that which is *material*, *iſſuable*, and may *be pleaded*, cannot be taken by proteſtation. Doc. Plac. 296.

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John recover againſt the ſaid *Henry* his debt aforeſaid, and his damages on occaſion of the detention of the ſaid debt to 50l., by the court here adjudged to the ſaid *John* with his aſſent, to be levied of the goods and chattels which were of the ſaid *Cornelius* in the hands of the ſaid *Henry* to be adminiſtered, if he have ſo much thereof in his hands to be adminiſtered, and if he have not, then the damages aforeſaid to be levied of the proper goods and chattels of the ſaid *Henry*; and the ſaid *Henry* in mercy, &c.

to be levied *de bonis teſtatoris ſi*, &c. *et ſi non*, &c. then the damages *de bonis propriis.*

Afterwards, to wit, on *Wedneſday* next after three weeks of the *Holy Trinity* in this ſame term, before our lord the king at *Weſtminſter*, comes the ſaid *Henry Holdipp* by *Thomas Sturmy* his attorney, and immediately ſays, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error in this, to wit, that by the record aforeſaid it appears that the judgment aforeſaid was given for the ſaid *John Otway* againſt the ſaid *Henry Holdipp*, whereas by the law of the land of this realm of *England* the ſaid judgment ought to have been given for the ſaid *Henry Holdipp* againſt the ſaid *John Otway*: therefore in that there is manifeſt error. There is alſo error in this, to wit, that no original writ, between the parties aforeſaid, in the plea aforeſaid, is filed, or remaining of record, in the cuſtody of the *cuſtos brevium* of our ſaid lord the king of the bench aforeſaid of the term of the holy Trinity, in the ſaid 19th year of the reign of our ſaid lord the now king of *England*, &c.; therefore in that there is manifeſt error. And the ſaid *Henry Holdipp* prays a writ of our ſaid lord the king to be directed to *William Thurſby* eſq. *cuſtos brevium* of our ſaid lord the king of the bench, to certify to our ſaid lord the king more fully the truth of the ſame; and it is granted to him, &c. Therefore the ſaid *William Thurſby* is commanded, that having ſearched the original writs of *London* of the ſaid term of the holy Trinity in the 19th year aforeſaid between the parties aforeſaid of the plea aforeſaid being in his cuſtody of record, what he ſhould find therein he certify to our ſaid lord the king without delay whereſoever, &c. as fully and entirely as the ſame were before him, together with the ſaid writ

Aſſignment of errors.

General error.

Diminution alleged in the want of an original writ.

Plaintiff prays a writ of *certiorari* to the *cuſtos brevium*.

Certiorari iſſued.

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writ directed to him, &c. And the ſaid *Henry Holdipp* prays the writ of our lord the king to warn the ſaid *John Otway*, to be before our lord the king to hear the record and proceedings aforeſaid; and it is granted to him, &c. by which it is commanded the ſheriff of *London*, that by good and lawful men, &c. he make known to the ſaid *John Otway* that he be before our lord the king in three weeks from the day of St. *Michael* wherefoever, &c. to hear the record and proceedings aforeſaid, if, &c. and further, &c.: the ſame day is given to the ſaid *Henry*, &c. at which day before our lord the king at *Weſtminſter* comes the ſaid *Henry* by his attorney aforeſaid; and the ſheriff has not ſent the writ. And thereupon the ſaid *John* on the ſame day being ſolemnly called comes by his attorney; whereupon the ſaid *Henry*, as before ſays, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error, by alleging the ſaid errors by him in form aforeſaid alleged; and he prays that the judgment aforeſaid, for the errors aforeſaid, and other errors in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether held for nothing, and that he may be reſtored to all things which he hath loſt by occaſion of the ſaid judgment, &c. and that the ſaid *John Otway* may rejoin to the errors aforeſaid, and he prays that the court of our lord the king here may proceed to the examination, as well of the record and proceeding aforeſaid, as of the ſaid matters above aſſigned for error.

Scire facias ad audiendum errores.

Vicecomes non miſit breve.

Joinder in error.

And the ſaid *John Otway* ſays that there is no error either in the record and proceedings aforeſaid, or in giving the judment aforeſaid; and he likewiſe prays that the court of our ſaid lord the king now here may proceed to examine, as well the record and proceedings aforeſaid, as the matters aforeſaid above aſſigned for error, and that the judgment aforeſaid may be in all things affirmed, &c. But becauſe the court of our ſaid lord the king here is not yet adviſed what judgment to give of and upon the premiſes, a day is therefore given to the parties aforeſaid before our ſaid lord the king until three weeks from the day of St. *Michael* wherefoever our ſaid lord the king ſhall then be in *England* to hear their judgment

Curia adviſare vult.

thereon; for that the court of our ſaid lord the king here is not yet adviſed thereof, &c. (And ſo it is continued from term to term) At which day before our ſaid lord the king at *Weſtminſter* come the parties aforeſaid by their attornies aforeſaid; whereupon all and ſingular the premiſes being ſeen, and by the court of our ſaid lord the king now here more fully underſtood, and diligently examined, and as well the record and proceedings aforeſaid, as the matter aforeſaid above for error aſſigned, being ſeen, for that it appears to the court of our ſaid lord the king now here, that in the record and proceedings aforeſaid, and alſo in giving the judgment aforeſaid, there is manifeſt error; it is conſidered that the judgment aforeſaid for the error aforeſaid, and other errors in the record and proceedings aforeſaid, be reverſed, annulled, and altogether held for nothing; and that the ſaid *Henry* be reſtored to all things which he has loſt by occaſion of the ſaid judgment, &c.

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Judgment reverſed.

Afterwards, to wit, on *Thurſday* next after 15 days of St. *Martin* in the 30th year of the reign of our lord *Charles* the 2d now king of *England*, &c. before our lord the king at *Weſtminſter* comes the ſaid *Henry Holdipp* by *Thomas Sturmy* his attorney, and acknowledges that he has had reſtitution and ſatisfaction from the ſaid *John* of all ſums of money, which he the ſaid *Henry* loſt by occaſion of the ſaid judgment; therefore let the ſaid *John* be quit of all ſuch ſums of money thereupon &c.

Reſtitution and ſatisfact on acknowledged on the record.

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Holdipp executor of Dowſe *verſus* Otway.

Caſe 18.

Trinity, 21 Car. 2. Regis. Rol. 1161.

ERROR, by *Holdipp* executor of *Dowſe* plaintiff againſt *Otway* defendant, to reverſe a judgment in an action of debt in the common pleas, in which *Otway* then plaintiff declared againſt *Holdipp* as executor, &c. upon a bill obligatory made by the teſtator 24th *November* 1650, whereby the teſtator acknowledged himſelf to be indebted to the plaintiff

S. C. 2 Keb. 622. S. C. cited 2 H. Black. 128.

7 Term Rep. 447.

In debt upon a bill obligatory, if the plaintiff has judgment by default, or con-

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in 68l., which he covenanted and promiſed to pay to the plaintiff, or his aſſigns, as ſoon as ſeveral bills of coſts of the teſtator, expended in the proſecuting of ſeveral ſuits in law and equity for Mr. *Robert Riggs* and *Margery Riggs* deceaſed, ſhould be duly audited, debated, and ſettled by two attornies to be indifferently choſen between them to examine and ſtate the accounts of the ſaid bills of coſts, the plaintiff paying to the teſtator his proportionable part, that is to ſay, the third part of the ſaid bills to be in form aforeſaid debated and ſettled: And the plaintiff by proteſtation that he was always ready to perform all things on his part, and alſo by proteſtation that there was not any ſum of money due to the teſtator upon any bill of coſts by him expended in proſecuting any ſuits for the ſaid *Robert Riggs* and *Margery Riggs*, the plaintiff in fact ſaid that neither the teſtator in his life time, nor the defendant upon his death, did ever ſhew or produce any bills of coſts, expended in the proſecution of the ſaid ſuits, to be audited, debated, and ſettled according to the tenor of the ſaid bills, whereby an action accrued to the plaintiff to demand and have the ſaid 68l. of the defendant: and upon this declaration the plaintiff had judgment by default in the common pleas; and becauſe the bill obligatory, upon which the plaintiff had declared was made ſo long before, the prothonotary taxed 50l. for intereſt and damages for the detention of the debt of 68l.: whereupon the judgment was entered in this manner, to wit, "Therefore it is conſidered that the ſaid *John* (the plaintiff) recover againſt the ſaid *Henry* (namely the defendant) his debt aforeſaid, and his damages on occaſion of the detention of the ſaid debt to 50l. by the court adjudged to the ſaid *John with his aſſent*, to be levied of the goods which were of the ſaid *Cornelius* (that is, the teſtator) in the hands of the ſaid *Henry* to be adminiſtered, if he have ſo much thereof in his hands to be adminiſtered, and if he have not, then the damages aforeſaid to be levied of the proper goods and chattels of him the ſaid *Henry*, and the ſaid *Henry* in mercy, &c." And it was a very hard caſe upon the defendant, who in truth had no aſſets, and yet was bound by this judgment to pay the 50l. for the damages out of his own

ſeſſion, the courſe of K. B. is to tax the damages for the detention of the debt, as well as the coſts, if the plaintiff will aſſent to it; but if he will not, he ſhall have a writ of inquiry of damages for the detention of the debt; but it is in the election of the plaintiff, and not of the defendant; and intereſt may be included in the damages. In debt upon a bill obligatory, for payment of money to the plaintiff as ſoon as ſeveral bills of coſts ſhould be debated and ſettled, it ought to appear in the declaration that the bills were ſettled, or that it was owing to ſome fault in the defendant that they were not ſettled.

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own proper goods; wherefore he brought a writ of error into the king's bench.

And *Saunders* of counſel with the plaintiff in the writ of error moved, that it was error, becauſe the court of common pleas had taxed damages *on occaſion of the detention of the debt*, where the damages did not appear judicially to the court, but ſhould have been inquired of by a jury upon a writ of inquiry. And although it appeared to the court what time was elapſed ſince the debt was firſt contracted, and ſince the making of the bill obligatory, and although, as it may be ſaid, they may compute the intereſt of the debt, yet it did not appear to the court what intereſt had been paid; and therefore he urged that in this caſe there ought to have been a writ of inquiry, and that taxing of the damages by the court was erroneous.

Sed non allocatur: for the whole courſe and practice of both courts is, upon a judgment in *debt* by default or confeſſion, to tax the damages on occaſion of the detention of the debt, as well as the coſts of ſuit; and it being *with the aſſent* of the plaintiff, which is always entered upon the record, as it is in this very caſe, ſhall conclude the defendant as appears by all the precedents in the books of entries. But if the plaintiff will not aſſent to it, then he ſhall have a writ of inquiry of damages on occaſion of the detention of the debt, if he will; but it is in the election of the plaintiff, and not of the defendant; and if the court can with the aſſent of the defendant tax 20s. or other ſmall ſum for damages on occaſion of the detention of the debt, for the ſame reaſon they may tax 20l., or other greater ſum for ſuch damages, if they ſee cauſe; wherefore this exception was over-ruled (2).

Then

(2) See vol. i. 58. b. 2 Ld. Raym. 774. So in *Bruce* v. *Rawlins*, 3 Wilſ. 61, 62. on a motion to ſet aſide the inquiſition on a writ of inquiry for exceſſive damages, where judgment was ſuffered by default, in an action of treſpaſs for breaking and entering the plaintiff's houſe, and opening and ſearching ſeveral boxes, and drawers, therein, *Willes* chief juſtice ſaid, "This is an in-"queſt of office to inform the conſcience "of the court, who, if they pleaſe, may "themſelves aſſeſs the damages." So where the plaintiffs obtained an interlocutory

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Then *Saunders* aſſigned an error in the declaration, that the plaintiff in the common pleas had not ſufficiently entitled himſelf to his action for the 68l. on the bill obligatory mentioned in the declaration; for it was not to be paid until the bills of coſts were debated and ſettled by two attornies to be indifferently choſen by the teſtator, and the plaintiff *Otway*; and *Otway* the plaintiff in the common pleas has averred that the teſtator had not ſhewn, or produced any bills of coſts; which is nothing to the purpoſe: for he was not bound to ſhew or produce any bills except only to the two attornies to be choſen to examine and ſtate them; but the plaintiff in the common pleas ought to have averred, that there were two attornies choſen, and the teſtator did not produce the bills of coſts to them to be ſettled; or that the plaintiff had choſen

locutory judgment in an action *of aſſumpſit*, and a writ of inquiry was awarded, *Wilmot* chief juſtice ſaid, "the taking "of the inquiſition and entering final "judgment were only the concluſion "and neceſſary conſequence of the in- "terlocutory judgment, for the court "themſelves, if they had ſo pleaſed, "might, upon the interlocutory judg- "ment, have aſſeſſed the damages, "and given final judgment thereupon: "and the inquiſition is only a matter "of courſe taken to inform the con- "ſcience of the court," 2 Wilſ. 272, 374. *Hewitt* v. *Mantell*. So in *Thelluſſon* v. *Fletcher*, Doug. 316. *Buller* juſtice obſerved, "that writs of inquiry "are often ſued out in caſes where they "are not neceſſary; as for inſtance, in "actions on covenants for payment of "a ſum certain;" and for this he cited this caſe of *Holdipp* v. *Otway*. And *Lawrence* juſtice, in *Blackmore* v. *Flemyng*, 7 Term Rep. 446, 447. referred to this caſe of *Holdipp* v. *Otway*, with reſpect to the prothonotary's taxing intereſt by way of damages, and that it was at the plaintiff's option either to refer it to the prothonotary to do ſo, or have a writ of inquiry of damages. In *Rex* v. *Aſſley*, 1 Sid. 412. judgment was obtained in debt upon a judgment, and it was moved for the plaintiff that the court ſhould tax the damages, namely, intereſt, without a writ of inquiry, and after ſome doubt made by the chief juſtice, it was at laſt referred to the ſecondary to tax the damages. See 11 H. 7. 5. b. Bro. *Default*, 105. 1 Roll. Abr. 571. (J.) pl. 1, 2, 3. 3 Leon. 213. *Ognell*'s caſe. So where there was judgment by default in an action on the caſe on a promiſſory note, it was referred by the court of common pleas to the prothonotary to aſcertain the damages and coſts, and calculate intereſt on the note, without a writ of inquiry. 1 H. Black. 252. *Raſhleigh* v. *Salmon*. Ibid. 529. *Andrews* v. *Blake*. Ibid. 541. *Longman* v. *Fenn*. And the ſame thing was done in the king's bench in the caſe of *Shepherd* v. *Charter*. 4 Term Rep 275. And it is now become the conſtant practice of both courts to do ſo.

See 12 Mod. 8. S. damages [illegible] one by the court for a [illegible].

one attorney, and required the teſtator to chooſe another, to examine and ſettle the bills, which he refuſed to do; whereby it might have appeared to the court, that there was no fault in the plaintiff, but a fault in the teſtator. But now it does not appear upon the record, that the money is yet payable; for they were payable upon the ſettling of the bills of coſts by the two attornies: and this does not appear to be done, nor that there was any fault in the teſtator why it was not done, and therefore the 68l. does not appear to be yet due according to the tenor of the ſaid bill obligatory. And of this opinion was the whole court (3); whereupon a rule was given to reverſe the judgment *niſi*, &c.; but *Jones* of counſel with the defendant in the writ of error ſaid, that he could not maintain the judgment; and therefore he prayed that it ſhould be reverſed for the expedition of his client, who intended to bring a new action; wherefore the judgment was reverſed abſolutely.

(3) This caſe is cited by *Eyre* chief juſtice in *French* v. *Campbell*, 2 H. Black. 177. who ſays that every poſſible condition upon which money is to become payable muſt be performed, or muſt be diſpenſed with upon ſufficient ground, before the money is demandable in an action; and in the declaration, in which it is demanded, it muſt appear, that the condition has been performed, if not literally, at leaſt ſubſtantially; or that, by reaſon of ſome default in the oppoſite party, the performance of the condition has been prevented, which diſpenſes with that performance. And if there is a condition annexed to a writing obligatory for the benefit of the obligor and the obligee is by the terms of it to do the firſt act, he muſt do, or concur in doing, the firſt act before he can demand the penalty. If a ſtranger is to do the firſt act, the obligee is to procure that ſtranger to do it, it being for his benefit, but if the obligee himſelf is to do it, the obligee cannot demand the penalty till he has done it; it is with regard to him, in the nature of a condition precedent. See 7 Rep. 10. *Ughtred*'s caſe. 1 Saund. 319, 320. *Lordage* v. *Cole* and note 4. 1 Ld. Raym 605. *Thorpe* v. *Thorpe*. 4 Bac. Abr. 6 *Hunloke* v. *Blacklowe*. Poſt. 155. *Peclers* v. *Opie*. Poſt. 350.

Caſe 19.

Allen *verſus* Rivington.

Hil. 21 & 22 Car. II. Regis. Rot. 802.

Ejectment.

Derbyſhire, to wit, } BE it remembered that on *Saturday* next after the octave of St. *Hilary* in this ſame term, before our lord the king at *Weſtminſter* came *George Allen* by *Benjamin Taylor* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *Robert Rivington*, in the cuſtody of the marſhal, &c. of a plea of treſpaſs and ejectment, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit; *Derbyſhire* to wit, *George Allen* complains of *Robert Rivington* being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, for that whereas *Ann Harriſon* ſpinſter, on the firſt day of *May*, in the 20th year of the reign of our lord *Charles* the ſecond now king of *England*, &c. at *Roſſon* in the ſaid county, demiſed, granted, and to farm let to the ſaid *George*, four acres of land, and four acres of paſture with the appurtenances, lying and being in *Roſſon* aforeſaid in the county aforeſaid, to have and to hold the tenements aforeſaid with the appurtenances, to the ſaid *George* and his aſſigns, from the 20th day of *April* then laſt paſt, until the full end and term of five years then next following, and fully to be complete and ended; by virtue of which ſaid demiſe the ſaid *George* entered into the tenements aforeſaid with the appurtenances, and was thereof poſſeſſed until the ſaid
[109] *Robert* afterwards, to wit, on the ſaid 1ſt day of *May* in the ſaid 20th year of the reign of our ſaid lord the king, with force and arms, &c. entered into the tenements aforeſaid with the appurtenances in and upon the poſſeſſion of him the ſaid *George*, and ejected, expelled and amoved the ſaid *George* from his poſſeſſion aforeſaid, his ſaid term therein being not yet ended; and the ſaid *George* from his ſaid poſſeſſion thereof held and kept out, and ſtill holds and keeps out; and other wrongs to him did againſt the peace of our ſaid lord

lord the now king, and to the damage of the ſaid *George* of 10l. and therefore he brings ſuit, &c. ALLEN v. RIVINGTON.

And the ſaid *Robert Rivington* by *William Frogatt* his attorney comes and defends the force and injury when, &c. and ſays that he is not thereof guilty, and of this he puts himſelf upon the country; and the ſaid *George* thereof likewiſe, &c. Therefore let a jury thereof come before our ſaid lord the king at *Weſtminſter*, on *Friday* next after the octave of the purification of the bleſſed *Mary* (*b*), and who neither, &c. to recognize, &c. becauſe as well, &c. the ſame day is given to the parties aforeſaid there, &c. Afterwards the proceſs thereof is continued between the parties aforeſaid of the plea aforeſaid, by the ſaid jury being reſpited between them, before our lord the king at *Weſtminſter* until *Wedneſay* next after 15 days of *Eaſter* (*c*) next coming, unleſs his majeſty's juſtices aſſigned to take the aſſizes in the county aforeſaid, ſhall firſt come on *Monday* the 22d day of *March*, at *Derby* in the ſaid county, according to the form of the ſtatute in ſuch caſe made and provided, for default of jurors becauſe none of them did appear. At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid by their attornies aforeſaid; and the ſaid juſtices of aſſize, before whom the ſaid iſſue was tried, have ſent here their record had before them in theſe words. Afterwards, that is to ſay, on the day and at the place within contained, before Sir *Thomas Tirrell* knt. one of the juſtices of our lord the king of the bench, and *Thomas Brome* ſerjeant at law, juſtices of our ſaid lord the king, aſſigned to take the aſſizes in the county of *Derby*, according to the form of the ſtatute, &c. come as well the within-named *George Allen*, as the within-written *Robert Rivington*, by their attornies within contained; and the jurors of the jury, whereof mention is within made, being ſummoned, alſo come who, to ſpeak the truth of the matters within contained, being choſen, tried and ſworn, ſay upon their oath, that before the treſpaſs and ejectment in the lands mentioned in the declaration within-written, one *John Hiblin* was ſeiſed of the ſaid lands in his demeſne as of fee; and being ſo thereof ſeiſed, made his laſt will and teſtament in writing of the lands within-written (among other things) by

Plea, not guilty.

Venire facias.

(*b*) The laſt day of Hilary term.

(*c*) The firſt day of Eaſter term, being the return day of the *diſtringas*.

Poſtea.

Special verdict.

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the name of a certain intache, in theſe words, "I give and bequeath unto *Ann Harriſon*, daughter of my ſon-in-law *Thomas Harriſon*, my intache in *Hopefield*, if my ſon *Thomas Hiblin* happen to leave no iſſue male, after the deceaſe of my wife: and if my ſon *Thomas Hiblin* have iſſue male, then my
[110] will is, that the ſaid *Ann* ſhall have 5l. paid her only, in lieu of the ſaid intache." And afterwards the ſaid *John* died, having iſſue the ſaid *Thomas Hiblin*, who had iſſue male of his body lawfully begotten one *Richard Hiblin*. And the jurors aforeſaid upon their oath aforeſaid further ſay, that *Ann* the wife of the ſaid *John Hiblin* ſurvived the ſaid *John*, and afterwards died; and that the ſaid 5l. mentioned in the ſaid laſt will was offered to the ſaid *Ann Harriſon* after the death of the ſaid iſſue male, and was refuſed by the ſaid *Ann Harriſon*. And the jurors aforeſaid upon their oath aforeſaid further ſay, that *Ann* and *Elizabeth Hiblin*, are the ſiſters and heirs of the ſaid *Richard*, and that the ſaid *Richard*, the ſon of the ſaid *Thomas*, died without iſſue male of his body lawfully begotten, and that the ſaid *Ann Harriſon entered* into the lands within-written, and demiſed them to the within-named *George Allen* the plaintiff, by virtue thereof the ſaid *George* entered into the lands within-written, and was thereof poſſeſſed until the within-written *Robert Rivington* entered in and upon the poſſeſſion of the ſaid *George*, and ejected him from his poſſeſſion in manner and form as the within-written *George* has within complained againſt him; and that the ſaid *Robert Rivington* the now defendant, is the guardian of the ſaid *Ann* and *Elizabeth Hiblin*, and entered for their uſe. But whether or not, upon the whole matter aforeſaid in form aforeſaid found, the ſaid *Robert Rivington* is guilty of the treſpaſs and ejectment aforeſaid, the jurors aforeſaid are altogether ignorant, and pray thereupon the advice of the juſtices and court here: and if, upon the whole matter aforeſaid in form aforeſaid found, it ſhall ſeem to the juſtices and court here, that the ſaid *Robert Rivington* is guilty of the treſpaſs and ejectment within-written, then the jurors aforeſaid upon their oath aforeſaid ſay, that the ſaid *Robert Rivington* is guilty of the treſpaſs and ejectment within-written.

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ten, in manner and form as the ſaid *George Allen* hath within thereof complained againſt him; and they aſſeſs the damages of the ſaid *George Allen* on occaſion of the treſpaſs and ejectment aforeſaid, beſides his coſts and charges by him about his ſuit in that behalf expended, to 6l., and for thoſe coſts and charges to 53s and 4d.: but if, upon the whole matter aforeſaid in form aforeſaid found, it ſhall ſeem to the juſtices and court here, that the ſaid *Robert Rivington* is not guilty of the treſpaſs of ejectment aforeſaid, then the jurors aforeſaid upon their oath aforeſaid ſay, that the ſaid *Robert Rivington* is not guilty thereof, as he the ſaid *Robert* has within in pleading alleged. And becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day is therefore given to the aforeſaid *George Allen* that he be before our lord the king at *Weſtminſter*, on *Wedneſday* next after the octave of the *Holy Trinity*, to hear their judgment thereupon, for that the court of our ſaid lord the king here is not yet adviſed thereof, &c. (and ſo it is continued until *Trinity* next following). Whereupon all and ſingular the premiſes being ſeen and by the court of our ſaid lord the king now here more fully underſtood, and mature deliberation being thereupon had, it is conſidered, that the ſaid *George Allen* do recover againſt the ſaid *Robert Rivington* his ſaid term yet to come of and in the tenements aforeſaid with the appurtenances, and his damages by the ſaid jury in form aforeſaid aſſeſſed, and alſo 13l. 6s. 8d. for his coſts and charges, by the court of our ſaid lord the king now here adjudged of increaſe to the ſaid *George Allen* with his aſſent; which ſaid damages in the whole amount to 16l. 6s. and let the ſaid *Robert Rivington* be taken, &c.

Curia adviſare vult.

Judgment.

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Caſe 19.

Allen *verſus* Rivington.

S. C. 2 Keb. 606. 1 Sid. 445. In ejectment, if it appear by the record of a ſpecial verdict, that the plaintiff has a priority of poſſeſſion, and no title is found for the defendant, the plaintiff ſhall have judgment.

EJECTMENT; the plaintiff declared of a leaſe made by *Ann Harriſon* to him of ſeveral lands in *Roſſon*, in the county of *Derby*; upon not guilty pleaded, the jury found a ſpecial verdict to this effect; they found, that one *John Hiblin* was ſeiſed in fee of the lands in queſtion, and ſo ſeiſed, by his laſt will in writing, deviſed them in this manner: "I give and bequeath unto *Ann Harriſon*, (the leſſor of the plaintiff,) daughter of my ſon-in-law *Thomas Harriſon*, my intache in *Hopefield*, if my ſon *Thomas Hiblin* happen to have no iſſue male, after the death of my wife; and if my ſon *Thomas Hiblin* have iſſue male, then my will is, that the ſaid *Ann* ſhall have 5l. paid her only, in lieu of the ſaid intache;" and that the deviſor died ſeiſed, leaving iſſue the ſaid *Thomas Hiblin*, who had iſſue male *Richard Hiblin*, and that *Ann* the wife of the deviſor ſurvived him, and afterwards died; and that the ſaid 5l. mentioned in the will was tendered to *Ann Hariſon* the leſſor of the plaintiff after the death of the iſſue male and was refuſed by her. And they further found that *Ann* and *Elizabeth Hiblin* are ſiſters and coheirs of *Richard* the iſſue male, who died without iſſue. And then the jury found the entry of the leſſor of the plaintiff, and the leaſe to the plaintiff, as in the declaration, and that the defendant as guardian of *Ann* and *Elizabeth Hiblin* ouſted him; and if upon the whole matter the defendant was guilty or not, the jury left it to the judgment of the court.

And upon this ſpecial verdict three points were intended to be argued. 1. Whether the leſſor of the plaintiff ſhall have an eſtate for life by the deviſe, becauſe at the time of the death of the wife, *Thomas Hiblin* had iſſue, although he died afterwards. 2. If the leſſor of the plaintiff ſhall have an eſtate for life after the death of the iſſue male, then the ſecond point was whether the tender after the death of the iſſue male was good, or whether it did not come too late after the death of the iſſue male, and ought to have been made in the life time of the iſſue male. 3. Whether any tender at

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all

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all of the 5l. was requiſite, or whether the leſſor of the plaintiff was not put to a ſuit againſt the executor or adminiſtrator of the deviſor for the 5l. But the matter of law was never argued, becauſe it appeared upon the record, that the leſſor of the plaintiff had a priority of poſſeſſion, and there was not any title found for the defendant: for though it be found that *Ann* and *Elizabeth Hiblin* were coheirs to *Richard Hiblin* the iſſue male, which was nothing to the purpoſe, yet it was not found that *they were heirs to the deviſor*; and the eſtate-tail, admitting it was ſo, appears to be ſpent by the death of *Thomas Hibling* without heir male, and therefore they had no title. And then the priority of poſſeſſion alone gives a good title to the leſſor of the plaintiff againſt the defendant and all the world, excepting againſt the heir of the deviſor. And it was ſaid at the bar, that it was not a miſtake in drawing the verdict, but the truth of the caſe was as contained in the verdict; therefore it was adjudged for the plaintiff.

But *Kelynge* chief juſtice ſeemed to be of opinion that it was a perfect eſtate tail in *Thomas Hiblin*, and that there was no neceſſity to tender the 5l., but the leſſor of the plaintiff might have a remedy for it in the ſpiritual court againſt the executor or adminiſtrator of the deviſor. And although it was ſaid that perhaps there were no aſſets, he anſwered that it would not alter the caſe. *Quære tamen, &c.*

Coryton & others *verſus* Lithebye.

Caſe 20.

Paſch. 22 Car. 2. Regis. Rot. 331.

Cornwall, to wit. } BE it remembered that heretofore, to wit, in the term of St. *Michael* laſt paſt before our lord the king at *Weſtminſter* came Sir *John Coryton* bart. and *Richard Harvey* by *Richard Goodenough* their attorney, and brought here into the court of our ſaid lord the king then there their certain bill againſt *John Lithebye* in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there

Same precedent 1 Mod. Ent. 181. A ſimilar precedent ſe tled by *Saunders*, Brownl. Rediv. 63, 64. S. P. Herne. 83, 84.

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there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Cornwall*, to wit, Sir *John Coryton* bart. and *Richard Harvey* complain of *John Lithebye* being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, for

W. F. ſeiſed in fee of two water corn-mills

that whereas one *William Findge*, on the 20th day of *July*, in the 9th year of the reign of our lord *Charles* the firſt late king of *England*, &c. was ſeiſed of, and in, two water corn-mills under one roof called *Caſtor* mills, within the manor of *Calliland* in the county aforeſaid, in his demeſne as of fee.

and J. C ſeiſed in fee of two other water corn-mills.

And whereas alſo the ſaid Sir *John Coryton*, on the 20th day of *April*, in the year of our lord 1651, and continually from thence hitherto hath been, and yet is, ſeiſed of two other water corn-mills under one roof called *Frogwel* mills, within

W. F. and J. C. immemorially repaired and kept in repair their reſpective mills, for grinding the corn of the tenants of the manor ſpent in their houſes,

the ſaid manor, in his demeſne as of fee. And whereas alſo as well the ſaid Sir *John Coryton*, as the ſaid *William Findge*, and all thoſe whoſe eſtate they *reſpectively* had in the ſaid mills, have, from time whereof the memory of man is not to the contrary, ſeparately and reſpectively from time to time ſufficiently repaired and amended the mills aforeſaid at their own proper coſts and charges, and kept them in repair, for the grinding of the corn and grain, of all the tenants inhabiting within the manor aforeſaid, uſed and ſpent in their ſeveral houſes within the manor aforeſaid; and alſo for the whole time aforeſaid have kept and maintained millers to grind ſuch corn and grain; *and in conſideration thereof*, they the ſaid Sir *John Coryton* and *William Findge*, and all thoſe whoſe eſtate they *reſpectively* had of and in the ſeveral mills aforeſaid, for the whole time whereof the memory of man is not to the contrary, have ground, and been accuſtomed to grind, at the mills aforeſaid, *or one of them*, all the corn and grain of all the tenants of the ſaid manor of *Calliland* inhabiting within the ſaid manor, by them uſed and ſpent in their ſeveral houſes within the ſaid manor, and have had and taken, for the grinding of every buſhel of ſuch corn and grain ſo ground, one gallon from and out of every buſhel of the ſaid corn and grain, and ſo in proportion for a greater, or leſs, quantity,

and in conſideration thereof have immemorially ground at the ſaid mill, or one of them, all the corn of all the tenants of the ſaid manor ſpent in their houſes,

and taken a certain toll for the ſame,

for toll for the grinding thereof (1.). And the ſaid *William Findge* being ſeiſed of his mills called *Caſtor* mills, the ſaid *William*, on the ſaid 20th day of *July*, in the ſaid 9th year of the reign of the lord *Charles* the firſt, at *Lanceſton* in the county aforeſaid, demiſed his mills to the ſaid *Richard Harvey* for the term of 99 years, if *Samſon Harvey*, *Agneta Harvey*,

CORYTON v. LITHEBYE.

W. F. demiſed his mills to plaintiff R. H.

(1) It is not neceſſary now, in an action for not grinding at the plaintiff's mill, to allege in the declaration, that the plaintiff was *ſeiſed* in fee, or of any other eſtate, of the mill, it being only matter of inducement; nor is it neceſſary to lay any *title* to the toll, or *conſideration* for it, or any *cuſtom* or *preſcription* for the defendant, or the inhabitants and reſiants within the manor, to grind at the mill, as is done in this precedent; but it is holden to be ſufficient for the plaintiff to declare generally upon his poſſeſſion of the mill, by reaſon whereof he is entitled to the toll and multure of the corn and grain ground at the mill; and that the defendant dwells in ſuch a houſe, and *ought* to grind all his corn and grain ſpent ground in his houſe, at the plaintiff's mill. Willes's Rep. 654. *Drake* v. *Wigleſworth*: the uſual form of the declaration at preſent being, "For that "whereas the ſaid (plaintiff) on the "day of in the year "of our Lord and long before "was, and continually from thence "hitherto has been, and ſtill is, *lawfully poſſeſſed* of, and in, a certain water "corn mill with the appurtenances, "ſituate, ſtanding, and being in the "pariſh of in the ſaid county "of H. called mill, and the ſaid "(plaintiff) by reaſon of his poſſeſſion "thereof, for all the time aforeſaid of "*right had*, and *ſtill of right ought to* "*have*, toll of corn or grain ground in the "ſaid mill. And whereas alſo the ſaid "(defendant) for all the time afore-"ſaid hath been, and ſtill is, poſſeſſed "of and in a certain meſſuage or dwel-"ling houſe with the appurtenances "ſituate, ſtanding and being in the "pariſh aforeſaid, in which ſaid meſ-"ſuage or dwelling houſe the ſaid (de-"fendant) during all the time aforeſaid "hath inhabited and dwelt, and by "reaſon thereof for all the time afore-"ſaid *ought* to have ground, and ſtill "of right *ought* to grind at the ſaid "mill, all his corn and grain after the "grinding thereof, (or, ground) uſed "and ſpent in the ſaid meſſuage or "dwelling houſe, and to pay to the ſaid "(plaintiff) for the grinding thereof "a reaſonable toll;" or, if the caſe is, that all the inhabitants of a manor are bound to grind at the plaintiff's mill, then, after alleging the plaintiff's poſſeſſion of the mill, and his right to toll as above, it may be ſtated in this way, "and that during all the time aforeſaid, "all the tenants, inhabitants and re-"ſiants within the ſaid manor of S. "*ought* to have ground, and ſtill *ought* "to grind, all their corn, grain, &c. "(as the caſe may be) which by them, "or any of them had been uſed, or "ſpent, ground within the manor at "the plaintiff's mills, and to have "paid

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Defendant a tenant of the ſa d manor dwelling within the ſame. Breach.

Harvey, and *Sanſon Brent*, or either of them, ſhould ſo long live; by virtue of which ſaid demiſe, the ſaid *Richard* entered into the ſaid mills called *Caſtor* mills, and was, and yet is, poſſeſſed thereof. And whereas alſo the ſaid *John Lithebye*, on the ſaid 20th day of *April*, in the ſaid year of our Lord 1651, and continually from thence hitherto hath been, and ſtill

" paid and yielded, and to pay and " yield, to the ſaid (plaintiff) for " the grinding thereof, a certain rea- " ſonable toll, and that the (defen- " dant) is a tenant, inhabitant and " reſiant within the manor," and then aſſigning a breach for not grinding at the mill. But the cuſtom muſt be proved at the trial, and enough proved to ſhew that it is a good ſubſiſting cuſtom, otherwiſe the plaintiff cannot recover. Willes's Rep. 657. This general way of declaring has been uſed for ſeveral years paſt; as, where in an action by a leſſee of an ancient mill for not grinding there, the declaration ſtated, " that the plaintiff for all " the time aforeſaid *had, and ought to* " *have*, toll of grain and malt ground " in the ſaid mill; and that all the in- " habitants, being in any ancient meſ " ſuage within the ſaid manor and bo- " rough, *of right ought to grind* at the " ſaid mill, all their grain and malt " after the grinding thereof ſpent in " their ſaid meſſuages, and to pay, for " the grinding thereof, a reaſonable " toll:" and upon not guilty pleaded, there was a verdict and judgment for the plaintiff in the king's bench; and upon error brought in the exchequer chamber, it was objected, that the plaintiff had not ſet forth *any title* in his declaration to the toll, or any cuſtom or preſcription for the inhabitants of thoſe ancient houſes to bring their corn to be ground there; but by the opinion of all the court, the judgment was affirmed; for it is ſufficient to ſay in this *poſſeſſory* action, that during the time aforeſaid, *he had, and ought to have* the toll, and that the inhabitants *ought* to grind. 2 Vent 286—292. *Chapman* v. *Flexman*: ſee alſo Willes's Rep. 654. *Drake* v. *Wigleſworth*.

So alſo in other poſſeſſory actions, it is holden not to be neceſſary to allege in the declaration the preciſe eſtate which the plaintiff is ſeiſed of, or to lay any title, either by grant, or preſcription, to the thing, which he is diſturbed in, and hindered from enjoying. As where in an action on the caſe for a diſturbance of a *toll* in a market, the plaintiff declared that L. B. by his indenture demiſed to the plaintiff the toll and profit of the fair and market days within the manor and town of T for a certain term, and that the defendant diſturbed and hindered him from taking divers pieces of wool within the manor and town aforeſaid; and after verdict and judgment for the plaintiff, an exception was taken to the declaration, that the plaintiff declared of a demiſe made by L. B. but did not ſhew that L. B. was *ſeiſed* at the time of the demiſe; but the exception was diſallowed

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ſtill is, a tenant of the ſaid manor, and poſſeſſed of a dwelling-houſe within the ſaid manor, in which the ſaid *John Lithebye* during the whole time laſt aforeſaid hath dwelt. Yet the ſaid *John Lithebye* well knowing the premiſes, but contriving and fraudulently intending to deprive the ſaid Sir *John Coryton* and *Richard Harvey* of the profits, which would have accrued

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by all the court, becauſe the plaintiff is to recover damages only, and the right or title of the land does not come in queſtion. Owen 109. *Eſcot* v. *Lanreny*. So where in an action on the caſe ſtating that the plaintiff was ſeiſed in fee of the manor of H. and of a fair held there every Aſcenſion day, and the defendant diſturbed him to take toll; it was moved in arreſt of judgment, that the declaration was not good, becauſe the plaintiff does not ſhew a title to the fair by grant or preſcription, and therefore has not any cauſe of action: but this objection was over-ruled by the court, becauſe it is only a conveyance to the action, and not any claim of the right, as in a *quo warranto*; and therefore the declaration is ſufficient without a ſpecial title comprized therein. Cro. Jac. 43. *Dent* v. *Oliver*. So in an action by the owner of an ancient ferry againſt a perſon who erects a new ferry near to his, it is holden, that the plaintiff may declare on his poſſeſſion, and need not ſet forth in his declaration that he keeps boats and ferrymen ſufficient to carry paſſengers over. Wille's Rep. 508. *Bliſſet* v. *Hart*. So where, in an action on the caſe for ſtopping a water-courſe, the plaintiff declared that he was ſeiſed in fee of a mill, and had a water courſe running in the defendant's land to the mill, and the defendant ſtopped the water-courſe, it was objected, that the declaration was inſufficient, becauſe it was not alleged therein that the mill was an ancient mill, and the water-courſe an ancient water-courſe, and that the plaintiff did not preſcribe to have a water-courſe in the defendant's land; but all the court held the declaration ſufficient, and that the plaintiff might well maintain his action upon the caſe, *being lawfully in poſſeſſion*, and the ſtopping of the water was tortious, and a damage to his mill; and though he did not preſcribe in a *que eſtate*, it was not material, as it had been ruled divers times before. Cro. Car. 575. *Sands* v. *Treſuſes*. And where, in an action upon the caſe for diſturbance of a way, the plaintiff declared that he was, and ſtill *is*, *poſſeſſed* of and in an ancient meſſuage with the appurtenances called C., *by reaſon whereof* he *had*, and *ought to have*, a way through and over the defendant's land, and that the defendant ſtopped it up, and obſtructed the plaintiff in the uſe of it; and upon a ſpecial demurrer ſhewing for cauſe that it did not appear by the declaration, how the plaintiff was entitled to the way, either by preſcription or grant, it was objected, that it was ſaid in the declaration that the defendant was *poſſeſſed*, and alſo it appeared by the declaration that the cloſes, upon which

CORYTON *v.* LITHEBYE. accrued to the ſaid Sir *John* and *Richard*, for the grinding of the wheat and barley of the ſaid *John Lithebye*, uſed and ſpent in his houſe, he the ſaid *John Lithebye*, on the 20th day of *December*, in the 20th year of the reign of our lord *Charles* the 2d., now king, &c. and before the day of exhibiting the bill of the ſaid Sir *John Coryton*, and *Richard Harvey*, did not grind

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which the way was claimed, were *the defendant's lands*, and therefore a title ought to be made to the way, either by grant or preſcription, though it would have been otherwiſe, if the action had been againſt a mere wrong doer; but notwithſtanding theſe objections, the court was of opinion, that the declaration was proper, and gave judgment for the plaintiff. 1 Lutw. 119. *Blockley* v. *Slater*. S. P 2 Vent. 185, 186. *Warren* v. *Sainthill* So, in the caſe of *Rider* v. *Smith* 3 Term. Rep. 766. where in an action on the caſe *for not repairing* a private road leading *through the defendant's ground*, the declaration ſtated that the plaintiff was poſſeſſed of a meſſuage, and by reaſon of his poſſeſſion thereof of right ought to have a way from his ſaid meſſuage through and over a certain cloſe of the defendant called the lane, and that the defendant was poſſeſſed of the ſaid cloſe called the lane, and that the defendant, *by reaſon of his poſſeſſion of the ſaid cloſe*, *ought* to have maintained and repaired, and ſtill of right *ought* to maintain and repair, at his own proper coſts and charges, the ſaid way, but the defendant ſuffered it to be ruinous and out of repair; and upon a general demurrer to this declaration, it was objected that the defendant could only be bound to repair the way *by ſome particular obligation*; for it was ſettled, that the *grantor* of a *private* way over his cloſe was not bound *of common right* to repair it, but the *grantee* who has the uſe of the way, ought by the common law to repair it, for which 1 Saund. 322. a. note (3.) Doug. 745 748. *Taylor* v. *Whitehead* were cited; therefore the declaration ought to have ſtated the particular obligation under which the defendant was bound to repair the way; and that *poſſeſſion* of the land, over which the way went, did not conſtitute ſuch an obligation; and the ſame diſtinction between the *owner of the ſoil*, and a *wrong doer*, was taken, as had been made in the caſe of *Blockley* v. *Slater* before cited from *Lutwich*, namely, that declaring generally on poſſeſſion was not ſufficient againſt the *owner of the ſoil*, though it was againſt a *wrong-doer*. But it was anſwered and reſolved by the court, that the diſtinction now no longer prevailed, and that this general mode of declaring had been allowed in both caſes alike, for more than a century paſt. And *Fuller* juſtice ſaid, it was curious to obſerve the progreſs of the different deciſions upon this ſubject; the preſent form of declaring grew by degrees; the firſt caſe upon the ſubject was *Holbach* v. *Warner*. Cro. Jac 665. which was an action upon the caſe for not repairing fences, and the declaration ſtated, that the plaintiff was poſſeſſed of a cloſe called H., and the defendant was poſſeſſed of a cloſe called G., and that *at the poſſeſſors* of the defendant's

grind at the mills of the ſaid Sir *John Coryton* and *Richard Harvey*, or either of them, 100 buſhels of wheat, and 100 buſhels of barley of the corn within the time aforeſaid uſed and ſpent in the houſe of the ſaid *John Lithebye* within the manor aforeſaid, but the ſaid *John Lythebye* for the whole time aforeſaid did grind the ſaid corn at ſome other mills; whereby the ſaid Sir *John Coryton* and *Richard Harvey* have entirely

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fendant's cloſe had uſed to make the hedges and fences between his (the defendant's) cloſe and the river A. which ran between the plaintiff's and defendant's cloſes, and that the defendant did not repair the hedges, &c. whereby the plaintiff's cattle eſcaped out of his cloſe to the defendant's, and from thence to the cloſe of one W. who ſued and recovered in treſpaſs; and on a motion in arreſt of judgment after a verdict for the plaintiff, the judges differed in opinion, two judges holding one way, and one another, and the matter was adjourned. The next caſe in point of time was 1 Vent. 264. *Anon.*, where in an action upon the caſe the plaintiff declared that the defendant, who was the *tenant* and *occupier* of ſuch a parcel of land adjoining to the plaintiff's, had time out of mind repaired ſuch a fence; after verdict for the plaintiff, *Holt* moved in arreſt of judgment, that the preſcription was *laid in occupiers, and their eſtate* not ſhewn, and *that* had been adjudged naught; but by the court, it is true, there have been opinions both ways; but it is good thus laid, for the plaintiff is a ſtranger, and preſumed ignorant of the eſtate; but otherwiſe it is if the defendant had preſcribed. Then came *Winford* v. *Wollaſton*, 3 Lev. 266. which was an action on the caſe for the diſturbance of a way, in which the plaintiff declared that for four years laſt paſt he was ſeiſed in fee of a parcel of land adjoining to a meadow of the defendant called B., and being ſo thereof ſeiſed for the whole time aforeſaid ought to have, enjoy, and uſe, a certain way through a certain gate of the defendant in B. to the plaintiff's cloſe; and after judgment by default, and a writ of inquiry of damages, it was moved in arreſt of judgment, that the plaintiff had not ſhewn any title by preſcription or otherwiſe, and therefore not good. But *Pollexfen* C. J. and all the court *contrà*; it is not ſubſtance, but form only, and good after judgment by default, or on a general demurrer; and ſome of them held it good in all caſes, although ſhewn for cauſe of demurrer: and afterwards in another term between *Warren* and *St. Hill*, ſuch a declaration was adjudged good upon demurrer. After that was the caſe of *Tenant* v. *Goldwin*, 1 *Salk.* 360. where in action on the caſe the plaintiff declared, that he was poſſeſſed of a meſſuage, and, in a cellar, part thereof, was wont to lay coals, beer, &c. that the cellar adjoined the defendant's meſſuage, and by a wall, which the defendant *ought to repair*, was ſeparated and defended from the defendant's privy, and that for want of repairing this wall, &c.; the declaration in this general way was holden to be ſufficient. The laſt caſe was *Reg.* v. *Bucknall*, 2 Ld. Raym.

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Averment of the exiſtence of the leaſe to R. H.

entirely loſt the toll of the ſaid corn to the damage of the ſaid Sir *John* and *Richard* of 40l., and therefore they bring ſuit, &c. With this that the ſaid Sir *John Coryton* and *Richard Harvey* will verify, that the ſaid *Sampſon Harvey* is ſtill ſurviving and in full life, to wit, at *Lanceſton* aforeſaid in the county aforeſaid.

Demurrer.

And now at this day, to wit, on *Wednesday* next after 15 days of Eaſter in this ſame term, until which day the ſaid *John Lithebye* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter* come as well the ſaid Sir *John Coryton* and *Richard Harvey* by their attorney, as the ſaid *John Lithebye* by *Henry Langford* his attorney, and the ſaid *John Lithebye* defends the wrong and injury when &c. and prays judgment of the declaration aforeſaid, becauſe he ſays that the declaration aforeſaid, and the matter in the ſame contained, are not ſufficient in law to have the action of the ſaid Sir *John Coryton* and *Richard Harvey* maintained againſt the ſaid *John Lithebye*, to which he the ſaid *John Lithebye* has no neceſſity, nor is he bound by the law of the land in any manner to anſwer. And this he is ready to verify; wherefore for want of a ſufficient declaration in this behalf, the ſaid *John Lithebye prays judgment of the declaration aforeſaid, and that the declaration may be quaſhed*, &c.

Willes's Rep. 470. Bullithorpe v. Turner.

Raym. 804. in which Lord *Holt* ſaid, that, where a man is obliged to make fences againſt another, it is enough to ſay that *omnes occupatores* ought to repair, becauſe it lays a charge upon the right of another, which it may be he cannot particularly know. See Com. Rep. 44. *Dorn* v *Gaſhford*. However, though it be not neceſſary now in theſe poſſeſſory actions to lay a title in the declaration by grant or preſcription as uſed to be done formerly, yet the title or conſideration *muſt be proved* at the trial, to entitle the plaintiff to recover; and perhaps the true reaſon why it is held not to be neceſſary to lay any conſideration or title in the *declaration* is, that it is a matter of *evidence* only. Thus, in an action for not grinding at the plaintiff's mill, the plaintiff is bound to prove the cuſtom to grind there, the defendant being ſubject to it, and the breach; and the defendant does enough if he diſprove any of them. Doug. 223. *Cort v. Berbeck*.

It is to be obſerved that actions on the caſe for not grinding at the plaintiff's mill have been ſubſtituted in modern times in the place of the writ *de ſectâ ad molendinum*, which formerly was the only method of trying queſtions of this ſort. F. N. B. 285. 7th edit. *Co. Ent.* 641.

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And the ſaid Sir *John Coryton* and *Richard Harvey* ſay that, by any thing before alleged, the ſaid declaration of the ſaid Sir *John Coryton* and *Richard Harvey* ought not to be quaſhed, becauſe they ſay that the declaration aforeſaid, and the matter in the ſame contained, are good and ſufficient in law to maintain the ſaid action of the ſaid Sir *John Coryton* and *Richard* againſt the ſaid *John Lithebye*, which ſaid declaration, and the matter in the ſame contained, they the ſaid Sir *John Coryton* and *Richard Harvey* are ready to verify and prove as the court, &c.; and becauſe the ſaid *John Lithebye* does not anſwer to the ſaid declaration, nor has hitherto in any manner denied the ſame, they the ſaid Sir *John* and *Richard Harvey* pray judgment and their damages on occaſion of the premiſes to be adjudged to them, &c. And becauſe the court of our ſaid lord the king here is not yet adviſed what judgment to give of and upon the premiſes, a day therefore is given to the parties aforeſaid before our ſaid lord the king at *Weſtminſter*, until day next after to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king now here is not yet adviſed thereof, &c.

Joinder in demurrer.

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Curia adviſare vult.

Coryton *verſus* Lithebye.

Caſe 20.

Paſch. 22 Car. II. Regis. Rot. 331.

ACTION upon the caſe by *Coryton* and *Harvey* againſt *Lithebye*; the plaintiffs declare that one *William Findge*, on the 20th of *July* in the 9th year of the reign of the lord *Charles* the Firſt, was ſeiſed of, and in, two water corn mills under one roof called *Caſtor* mills, within the manor of *Calliland* in the county of *Cornwall*, in his demeſne as of fee; and the ſaid plaintiff *Coryton*, on the 20th of *April* in the year of our Lord 1651, and continually afterwards hitherto, hath been, and yet is, ſeiſed of two other water corn mills under one roof called *Frogwell* mills, within the ſaid manor, in his demeſne as of fee; and that as well the ſaid plaintiff

S. C. 2 Lev. 27. 1 Vent. 167. If two perſons have an *entire joint damage*, they may bring a joint action, though their *intereſts* are ſeveral. 2 Vin. 55. pl. 46.

Coryton, as the ſaid *Findge*, and all thoſe whoſe eſtate they reſpectively had in the ſaid mills, have from the whole time whereof the memory of man is not to the contrary, ſeparately and reſpectively from time to time ſufficiently repaired, and amended, the ſaid mills at their own proper coſts and charges, and kept them in repair for the grinding of the barley and wheat of all the tenants inhabiting within the manor aforeſaid, uſed and ſpent in their ſeveral houſes within the ſaid manor; and alſo for the whole time aforeſaid have kept and maintained millers to grind ſuch barley and wheat; and in conſideration thereof, they the ſaid Sir *John Coryton* and *William Findge*, and all thoſe whoſe eſtate they reſpectively had of and in the ſeveral mills aforeſaid, for the whole time whereof the memory of man is not to the contrary, have ground, and been accuſtomed to grind at the ſaid mills or one of them, all the wheat and barley of all the tenants of the ſaid manor of *Calliland* inhabiting within the ſaid manor, by them uſed and ſpent in their ſeveral houſes within the ſaid manor, and have
[116] had and taken, for the grinding of every buſhel of ſuch wheat and barley ſo ground, one gallon from and out of every buſhel of the ſaid wheat and barley, and ſo in proportion for a greater or leſs quantity, for toll for the grinding thereof; and that the ſaid *Findge* being ſo ſeiſed of the ſaid mills called *Caſtor* mills, on the 20th day of *July* in the ſaid 9th year of the reign of the lord *Charles* the Firſt, demiſed them to the ſaid plaintiff *Harvey* for a term of years, (and ſhews the certainty of it), by virtue whereof he entered, and was and ſtill is poſſeſſed; and that the ſaid defendant on the ſaid 20th day of *April* 1651, and always afterwards, was, and yet is, a tenant of the ſaid manor, and poſſeſſed of a dwelling-houſe within the ſaid manor, in which the defendant for all the ſaid time has dwelt; yet the defendant well knowing the premiſes, but contriving and fraudulently intending to deprive the ſaid plaintiffs of the profits, which would have accrued to the ſaid plaintiffs for grinding the wheat and barley of the ſaid defendant uſed and ſpent in his houſe, the ſaid defendant did not grind at the mills of the ſaid plaintiffs, or either of them, 100 buſhels of wheat, and 100 buſhels of barley, of the corn ſpent in the houſe of the ſaid defendant between the 20th day of

December in the 20th year of the reign of the now king, and the day of exhibiting the ſaid bill, but for the whole time aforeſaid did grind the ſaid corn at ſome other mills, whereby the ſaid plaintiffs entirely loſt the toll of the ſaid corn to their damage, &c. upon which declaration it was demurred in law.

And the principal cauſe of demurrer was, becauſe both the plaintiffs had joined in one action, where it appears that their intereſts are *ſeveral*; and *Kelynge* chief-juſtice in his lifetime, on the firſt opening of the caſe, ſeemed to be of that opinion. And now in this term it was moved again: and *Hale* chief-juſtice, and all the court was of opinion, that they might well join in the action, for though their intereſts are ſeveral, yet the not grinding at any of their mills is an intire joint damage to both the plaintiffs, for which they ſhall have their joint action; for otherwiſe the damages will be twice recovered if they bring ſeveral actions (2).

And

(2) This caſe is cited and approved of upon this point in 2 Wilſ. 423. *Weller* v. *Baker*; and on the authority of it the court of common pleas held, that ſeveral perſons, called *dippers* at *Tunbridge wells*, might join in an action againſt a perſon, who exerciſed the buſineſs of a dipper, not being duly appointed, and diſturbed the plaintiffs therein. That caſe was, that of theſe dippers there were only 12 in number, all women, who were choſen by the freeholders of the manor within which the wells lay, and approved of by the lord of the manor; and that the buſineſs of a dipper was to attend the wells, and deliver the water to the company who reſorted there, and the employment was attended with profits which aroſe merely from the voluntary contributions of the company; and the defendant having acted as a dipper without a proper appointment, the dippers *joined* in an action againſt her for the diſturbance, which was thought by the court to be well brought, becauſe although the dippers were *ſeverally* entitled to receive for their own ſeveral uſe ſuch voluntary gratuities as the company were pleaſed to give them reſpectively, yet with regard to a ſtranger's diſturbing them in their *employment*, they were all *jointly* concerned in point of intereſt; and that it was a hurt done to them all. See 1 Saund. 153. *Eccleſton* v. *Clipſham*. Ibid. 291. b. note 4. *Cabell* v. *Vaughan*.

With reſpect to thoſe who may join, or be joined in the ſame action, it is to be obſerved, that, regularly where two or more are jointly entitled, or have a joint intereſt, they may join in the ſame action; as where two joint owners of a ſum of money, travelling together on the highway, were robbed of the money, and thereupon they brought a joint action

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And the court alſo held the preſcription good in the manner it was laid, and that pleading it by the word "*reſpectively*," was good enough to avoid prolixity; for otherwiſe the preſcription to repair the mills will be laid twice over. But then *Hale* took an exception, that the preſcription was not well alleged that the plaintiffs ought to grind all the wheat, &c. "*at*

againſt the hundred; and on an objection being taken to the action becauſe it was brought jointly by them, whereas each of them ought to have had a ſeparate action, the court held that they might join well enough in this caſe, becauſe they were jointly entitled to the damages to be recovered againſt the hundred, though it would have been otherwiſe, if the ſum had been the ſeveral property of the parties robbed. Dy. 370. a. pl. 59. So in 2 Leon. 12. pl. 19. it appears, that three men were robbed on the highway, and they three joined in an action againſt the inhabitants of the hundred, and no objection was taken to the action upon that account. But this, it ſeems, muſt be underſtood of three perſons who were robbed of property which they were jointly entitled to. So where A. and B brought an action of *aſſumpſit*, and declared that their ſeveral cattle had been diſtrained, and that the defendant, in conſideration of 10l. paid him by the plaintiffs, promiſed to procure the cattle to be re-delivered unto them by ſuch a time, and that he had not done ſo; after verdict for the plaintiffs, it was objected in arreſt of judgment, that the plaintiffs ought to have brought *ſeveral* actions, in regard the promiſe was not an entire, but a ſeveral, promiſe made to each of the plaintiffs; but it was adjudged by *Rolle* chief juſtice and two other judges, againſt one, that the action was well brought jointly by A. and B., for though the cattle which belonged to A. ought to be reſtored to him, and the other cattle to be reſtored to B., and ſo the thing to be performed was ſeveral and not joint, yet inaſmuch as the *contract* and *conſideration* were joint, and it is not known how much one gave and how much the other, the action was well brought jointly. 1 Roll. Abr. 31. pl. 9. S. C Sty. 156, 157. 203. *Vaux* v. *Steward*, and *Vaux* v. *Draper*. So where two perſons brought an action for a falſe return to a *mandamus*, and declared of a cuſtom in the pariſh of C. for the pariſhioners in *Eaſter* week to elect two perſons to be church-wardens for the year enſuing, and that the plaintiffs had been elected according to the cuſtom, but the defendant ſurrogate of the biſhop refuſed to admit them, whereupon they brought a *mandamus*, to which he falſly and maliciouſly returned a cuſtom for the vicar to chooſe one church-warden, wherefore he could not admit both the parties, but was ready to admit one of them, by means whereof they could not undertake their ſaid offices; and after a verdict for the plaintiffs, it was moved in arreſt of judgment, that the plaintiffs ought not to join in the action, for the wrong or

damage

"*at the ſaid mills, or one of them,*" which may be, though one mill only be an ancient mill, and the other not; for in that caſe it is true that they ought to grind "at the ſaid mills, or one of them;" and therefore he ſaid that it ought to have been laid, that they ought to grind at the ſaid mills, or one of them, that is to ſay, all the multure which is not ground at

damage to one is not a wrong or damage to the other, and the office of one is not the office of the other; and they concluded that by reaſon thereof they could not undertake their ſeveral offices; but after ſeveral arguments, judgment was given for the plaintiffs by the whole court; for the *mandamus*, and the whole proſecution and charge thereof were joint; and it is not an offence of that nature, nor was the action brought for that, but for the unjuſt return, by which they were put to the charge of the *mandamus*. 3 Lev. 362. *Hex* [illegible] So where the regiſter or a biſhop refuſed to regiſter a licence of a chapel for a conventicle, according to the ſtatute 1 W. and M. c. 18. ſ. 19., and upon a *mandamus* to him to regiſter it ſued out by four or five of the inhabitants, he made a falſe return, upon which the inhabitants, who ſued out the *mandamus*, brought an action againſt him for the falſe return, and upon demurrer it was holden by the court, that they might all well join in the action againſt him for the falſe return. 3 Lev. 363. So two or more tenants in common, or jointenants, muſt join in a *quare impedit* of an advowſon, for it is an intire thing, and one of them cannot have a *quare impedit* of a moiety, or of a third or fourth part of an advowſon of a church, but they muſt join; and therefore they ought to *agree* in a preſentation, though it is otherwiſe of coparceners, for if they do not agree, the eldeſt ſhall have the preſentation. Bro. *Joinder in Action*, 103. But where A. and B were the grantees of the *next avoidance* of a church, and before any avoidance A. releaſed his intereſt to B. and then the church became void, it was holden that B. alone ſhould preſent to the church, and if he be diſturbed, might bring a *quare impedit* in his own name only Cro Eliz. 600. *Beaſt* v. *Biſhop of Norwich*. So in an action on the caſe for arreſting and ſtopping a ſhip by proceſs out of the admiralty court proſecuted by the defendant, it was adjudged that *all* the proprietors of the goods ought to join: but where only one brought the action and had judgment, the joint proprietorſhip not being pleaded in abatement, the judgment was affirmed in error; for though it appeared by the declaration that there were four other jointenants of theſe goods with the plaintiff, yet it did not appear but they were dead, and then the plaintiff alone was entitled to the action; and wherever jointenancy is pleaded in abatement, the life of the other jointenant, not named, is averred in the plea, otherwiſe it is ill, according to 1 Saund 291. *Cabell* v. *Vaughan*, 1 Salk 31. *Child* v. *Sands*, S C. 3 Lev. 351. 4 Mod. 176, 181. Skin. 334. 361. 6 Term Rep. 766. *Addiſon* v. *Overand*.

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at the plaintiff *Coryton*'s mills, at the mills of the plaintiff *Harvey*, and all the multure which is not ground at the plaintiff *Harvey*'s mills, at the mills of the plaintiff *Coryton*. And *Twyſden* juſtice took another exception, that the preſcription was laid too generally; for it is, that the plaintiffs ought to grind all the multure and corn which is ſpent in the defendant's

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But if a man ſays to two perſons, "you have murdered J. S." or imputes to them any other ſlander, they cannot join in one action againſt him for ſpeaking theſe words, but each of them muſt bring a ſeparate action, for the wrong done to one is no wrong done to the other. Cro. Car. 513. *Smith* v. *Cooker*. So two perſons cannot join in an action of falſe impriſonment, or aſſault and battery; for the impriſonment and battery done to one cannot be the ſame as that done to another. Owen, 106. Bro. *Joinder in Action*, 65. Fitz. *Joinder in Action*, 17. But two or more partners may join in an action of ſlander for words ſpoken of them in the way of their trade, whereby they have ſuſtained ſpecial damage. As where two perſons, woolſtaplers and copartners, who had bought a quantity of wool to be weighed by themſelves, and paid for according to weight, brought an action againſt another for ſaying of them in the way of their trade, that when the wool was weighed by the plaintiffs there was a pound weight concealed under the braſs weight, ſtating ſpecial damage by reaſon of ſpeaking the words; it was held on a general demurrer that they might well join in the action, becauſe the damages were joint and entire to plaintiffs as copartners who were jointly intereſted, and a multiplicity of actions would be created, if the contrary doctrine were to be maintained. 3 Boſ. & Pull. 150. *Cooke* v. *Batchelor*. See the form of ſuch an action in Brownl. Rediv. 81. Though there was ſpecial damage laid in the declaration in this caſe, yet if words are actionable only becauſe they were ſpoken of perſons in the way of their trade, I conceive that two or more partners may join in an action for the words, though they had ſuſtained no *ſpecial* damage thereby. It ſhould ſeem that two jointenants, or coparceners may join in an action of ſlander of *their title* to the eſtate; for as it muſt be ſhewn in the declaration and proved, that the plaintiffs received ſome particular damage by reaſon of the ſlander, the *damage* even, as well as their intereſt in the eſtate, is joint. But where a father and ſon covenanted with a purchaſer to ſell lands, &c. and, "*item* it was agreed between the parties," that the purchaſer ſhould pay ſo much of the purchaſe money to the ſon, and an action for ſuch money was brought in the *name of both*; and upon a demurrer to the declaration it was held ill, becauſe the duty was veſted in the ſon, and he alone ought to have brought the action; and judgment was given for the defendant. 3 Mod. 263. *Tippet* v. *Hawkey*. So with reſpect to actions brought *againſt two*; if

two

ant's houſe, and therefore the defendant cannot ſpend any corn in his houſe unleſs it be firſt ground; and ſo he cannot feed any poultry, or give any to his cattle, or make furmity with it, (as he ſaid,) unleſs it be ground, and therefore he ſaid it was unreaſonable (3). And for theſe two exceptions, judgment at the prayer of *Saunders* of counſel for the plaintiffs, was

two men falſely and maliciouſly procure another to be indicted for a common barrator, he may have an action upon the caſe in the nature of a conſpiracy *againſt both*; though in ſtrictneſs the procurement of one is not the procurement of the other; ſo in the caſe of maintenance and treſpaſs, and yet the maintenance or treſpaſs of the one is not the maintenance or treſpaſs of the other. Latch. 262. *Pencavin* v. *Trapping*. So a joint action of debt may be brought againſt ſeveral perſons to recover one penalty upon the game laws; as for inſtance to recover the penalty of 5*l.* under the ſtatute 5 Ann. c. 14. ſ. 4. for keeping a lurcher to kill and deſtroy the game. 2 Eaſt 573. *n.* (*a*) *Handyman* v. *Whitaker*. So a joint action of debt may be brought againſt ſeveral defendants upon the ſtatute 2 & 3 Edw. 6. c. 13. for not ſetting out their tithes. Carth. 361. *Baſtard* v. *Hancock*. And in both theſe actions the jury may find a verdict againſt ſome of the defendants, and acquit the reſt. For theſe actions are not to be conſidered as founded on a *contract*, but on a *tort*, which is joint and ſeveral, and in which ſome may be found guilty, and the others acquitted. Bro. *Reſponder*, 63. and, *not guilty*, may be pleaded thereto. For if they were founded *on a contract* the defendants would be anſwerable *jointly* or not at all; and the jury could not find a verdict againſt one of the defendants and acquit the others, becauſe the verdict of acquittal of ſome would negative the joint contract.

But a man cannot bring a joint action againſt two and declare againſt one of them for an *aſſault and battery*, and againſt the other *for taking away his goods*, becauſe the treſpaſſes are of ſeveral natures, and againſt ſeveral perſons, and they cannot plead to this declaration Sty. 153, 154. *Cutſworth's* caſe. So one action will not lie againſt ſeveral perſons for ſpeaking the ſame words; as where a man brought an action againſt two for ſaying, "thou haſt "ſtolen plate from *Cambridge* of J. S. "and we do arreſt thee of that felony;" and there being a verdict for the plaintiff, it was moved in arreſt of judgment, that the action does not lie againſt two jointly, becauſe the words of one are not the words of the other, but there ought to have been ſeveral actions, in like manner as two perſons cannot bring a joint action for words, and ſo it was reſolved by the court, for theſe ſeveral cauſes can no more produce a joint action, than their words and tongues may be ſaid to be one. Palm. 313. *Chamberlaine* v. *Willmore*. S. C. Cro. Jac. 647. 1 Bulſ. 15 *Stroud* v. *Roper*. But where in an action againſt huſband and wife for that *they* ſpoke of the plaintiff

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It is not neceſſary to ſtate that the mills were ancient mills.

was given for the defendant, becauſe he intended to bring a new action, and amend thoſe faults.

Note;—an exception was taken that it was not averred that the mills were ancient mills, but the court thought it was good enough without ſuch an averment.

tiff certain ſcandalous words, the jury found the huſband guilty, and the wife *not guilty*, the plaintiff ſhall have judgment; for though the action ought not to have been brought againſt both, and therefore if the defendant had demurred to the declaration it would have been bad, yet the verdict hath cured this error. 1 Roll. Abr. 781. (O) pl. 1. Sty. 349. *Burcher* v. *Orchard*. S. C.

This naturally leads me to conſider what *cauſes* may be joined in the ſame declaration. It is ſaid, that the true teſt to try whether two counts can be joined in the ſame declaration is to conſider whether there be the ſame judgment in both, and not whether they both require the ſame plea, and wherever there is the ſame judgment in both, they may well be joined. 2 Wilſ. 321. *Dickon* v. *Cliſton*. But in a ſubſequent caſe it was thought, that this rule or teſt, as laid down in *Dickon* v. *Cliſton*, is rather too large, and not univerſally true, though it may be one good rule or teſt, among others, to try this point by. 3 Wilſ. 354. *Mail* v. *Goodſon*. It has been adjudged, that debt on an obligation, and on a *mutuatus*, may be joined in the ſame action though the former is a contract under ſeal, and the other only a ſimple contract, and the plea to the one is *non eſt factum*, and to the other *nil debet*, but the judgment is the ſame in both. 1 Vent. 366. *Deniſon* v. *Ralphſon*. Cro. Car. 316. *Parker* v. *Taylor*. So debt and detinue may be joined in the ſame action, for they are of the ſame nature; though in 9 Mod. 92. *Dalſton* v. *Janſon*, it is ſaid by the court, that it ſeems ſtrange that debt and detinue ſhould be joined, becauſe theſe actions have different judgments. But debt and treſpaſs, or debt and account cannot be joined, for they are of different natures Bro *Joinder in Action*. 91. So debt for rent upon a leaſe, either by parol or indenture, and for goods ſold and delivered may be joined in the ſame action. Bro. *Joinder in Action*, 90. Gilb. H. C. P 5. 4 Bac. Abr. 11. So ſeveral treſpaſſes committed on ſeveral days and in ſeveral places, though ſeparate wrongs, and ſeveral cauſes of action, may be joined in the ſame action 8 Rep 87. b. *Buckmere's* caſe. So an action againſt a common carrier upon the cuſtom of the realm, or for a miſfeaſance, and trover may be joined. 4 Bac. Abr. 11. 2 Wilſ. 319. *Dickon* v. *Cliſton*. 1 Vent. 223. *Owen* v. *Lewyn*, 365. *Deniſon* v. *Ralphſon*. 1 Term Rep. 277. *Brown* v. *Dixon*. So an action on the caſe for immoderately riding a horſe and trover may be joined. 1 Lutw. 98—101. *Cowper* v. *Towers*. Cro. Car. 20. *Whyte* v. *Ryſden*. So an action on the caſe for diſturbing the plaintiff in his right of common and of cutting and taking ruſhes upon the common for litter for his cattle, and trover may be joined. 3 Wilſ. 456. *Beau* v. *Bloom*. But detinue

detinue and trover cannot be joined. Willes's Rep. 118. *Kettle* v. *Bromſall.* So debt upon a bond and upon a judgment may be joined in the ſame action. 1 Lutw. 43. *Wentworth* v. *Squib.* So in 1 Wilſ. 248. *Duke of Bedford* v. *Alcock,* it was holden that debt for an amercement in a court leet, and a *mutuatus* may be joined, and it was ſaid in that caſe, that the true way to judge of this matter is this, that wherever the ſame *proceſs* and *judgment* are in two counts, they may be joined, otherwiſe they cannot; and for this reaſon it is, that debt on a judgment and a *mutuatus*, or debt on a bond and a *mutuatus* may be joined, although different pleas be required; ſee the form of a declaration in debt upon an amercement and a *mutuatus.* 2 Brown Ent. 83, 84. 2 Salk. 772. *Brook* v. *Huſſler.* So an action on the caſe againſt the defendant for wrongfully and injuriouſly obſtructing and hindering the plaintiff from landing his goods upon a yard of the defendant, contrary to a written agreement between them, and trover may be joined. 3 Wilſ. 348—354. *Maſt* v. *Goodſon.* So an action on the caſe for not returning to the plaintiff a ſpaniel delivered by him to the defendant to be viewed and returned in a reaſonable time, but keeping and detaining the ſpaniel from the plaintiff, may be joined with a count in *trover.* 1 Term Rep. 274. *Brown* v. *Dixon;* and it is there ſaid, "that perhaps the rule of judging "whether two counts can be joined, by "conſidering whether the ſame judg-"ment can be given on both, is not "true in its extent; but by adding "another requiſite it is univerſally true. "For wherever the *ſame plea* may be "pleaded, and the *ſame judgment* given "on two counts, *they may be joined* in "the ſame declaration." It appears however by the before cited caſes where it is held that debt on bond and on a *mutuatus,* and debt on bond and on a judgment, may be joined, which unqueſtionably is good law, that by the laſt mentioned rule it is not meant that no counts can be joined *unleſs* as well the ſame plea may be pleaded, as the ſame judgment given on them; but that the meaning of the rule is, that it is univerſally true as far as it extends; and ſo it certainly is, and may be adopted with great advantage wherever it applies.

But actions founded upon a *tort* and upon a *contract* cannot be joined in the ſame declaration; as *aſſumpſit* and action upon the caſe for *a tort,* becauſe the pleas are different. 1 Term. Rep. 276. *Brown* v. *Dixon.* 1 Vent. 366. *Deniſon* v. *Ralphſon.* So *aſſumpſit* and *trover* cannot be joined, and though there is a verdict for the defendant on the count for the trover, yet it is ſaid, that does not cure the declaration, but it is bad *ab initio.* 2 Lev. 101. *Holms* v. *Taylor.* 3 Lev. 99. *Bage* v. *Bromuel.* 1 Salk. 10. *Dalſton* v. *Janſon.* 3 Wilſ. 354. *Maſt* v. *Goodſon.* So *aſſumpſit,* and an action upon the caſe founded *upon fraud, or deceit,* cannot be joined, becauſe they require different pleas. Carth. 189. *Willett* v. *Tydy.* So a count by the plaintiff as executor on a contract made with his teſtator, and a count in his own right cannot be joined; as where H. brought an action as adminiſtrator to A., and declared on an *indebitatus aſſumpſit* to A, and an *inſimul computaſſet* between plaintiff and defendant for money

money due to the plaintiff himſelf; Hob. 88. *Herrenden* v *Palmer*. 1 Salk. 10. *Rogers* v. *Cooke*. 3 Term Rep. 659, 660. *Petrie* v. *Hannay*. 2 *Saund*. 210. *a. note*. It has been ſaid, that a count for money had and received by the defendant *to the uſe of the executor* as ſuch, may be joined to a count for money had and received *to the uſe of the teſtator*. 3 Term Rep. 659, 660. But this ſeems queſtionable; for money received to the uſe of an executor after the death of the teſtator, gives a different cauſe of action to the executor from that which accrued to the teſtator by the receipt of the money in his life time. In the latter caſe, the executor muſt neceſſarily ſue as ſuch, and is not liable to coſts if he fails in the action; but in the former caſe he need not ſue as executor, but may bring the action in his own name; and if he does ſue as executor, he is liable to coſts as any other perſon is. 1 Ld. Raym. 437. *Nicolas* v. *Killigrew*. 2 Ld. Raym. 1215. *Wallis* v. *Lewis*. 2 Term Rep. 477. *Smith* v *Barrow*. It ſeems to be as much a *new contract* as if a *promiſſory note*, or a *bond*, had been given to him *as executor*, in which caſe it is held that the executor cannot join a count on ſuch note or bond made to him *as executor* to a count on a promiſe made, or a debt due to the *teſtator*. 10 Mod. 316. *Betts* v. *Mitchell*. 3 Boſ. & Pull. 7. *Hoſier* v. *Lord Arundel*. For the ſame reaſon it ſhould ſeem, that an executor cannot join an *inſimul computaſſet* for money *due from the defendant to him as executor*, to a count on a promiſe made to the teſtator; the executor on ſuch a count being liable to coſts. 1 Ld Raym. 437.; for the old notion that the money recovered will be aſſets, and therefore the executor is not ſubject to coſts, which was the ground of the deciſion in Sir *T. Jones*, 47. *Bull* v. *Palmer*. 2 Lev. 165. S. C. ſeems to be now exploded. 7 Term Rep. 358, 359. *Bollard* v. *Spencer*; but perhaps an *inſimul computaſſet* with the plaintiff as executor *for money due to the teſtator*, may be joined to a count on a promiſe made to the teſtator; for the accounting with the executor does not give a new duty, but only aſcertains that which was due before, and therefore the duty to the teſtator is not altered thereby. See alſo *ante*, 47. k.

Since the former part of this note was written the ſubject of joining counts by an executor has been much conſidered; and it is now held that if the money recovered on each of the counts will be *aſſets* according to the rule in the before-mentioned caſe of *Bull* v. *Palmer*, the counts may be joined in the ſame declaration. And therefore in the caſe of *Ord* v. *Fenwick*, 3 Eaſt, 104. it was held that a count in aſſumpſit to the plaintiff *as executrix* for money *paid by her* to the defendant's uſe, may be joined with another count on promiſes made *to the teſtator*. And ſo is the caſe of *Foxwist* v. *Tremaine*, poſt. 207. And in *Cowell* v. *Watts*, 6 Eaſt, 405. the court held that a count, upon a promiſe to the plaintiff *as adminiſtratrix* for goods ſold and delivered by her after the death of the inteſtate, may be joined with a count upon an account ſtated with her *as adminiſtratrix*, aſſigning as a reaſon that whenever the money when recovered would be *aſſets* the counts may be joined. But it muſt be ſtated in the count that the duty accrued to the plaintiff in his repreſentative capacity of executor. It is not enough to ſay that

it

it accrued to him executor, or being executor: it muſt be averred that it accrued to him *as executor*. And therefore where a count, upon an account ſtated with the plaintiff *executrix*, (not ſaying *as* executrix,) was joined with a count on a promiſe to the teſtator, it was held in error after judgment by *nil dicit* and a writ of inquiry and final judgment that thoſe two counts could not be joined. 5 Eaſt, 150. *Henſhall* v. *Roberts*.

So a plaintiff ſhall not have an action *againſt* another, to charge him as executor, and alſo in his own right; for the judgment in the one caſe is *de bonis teſtatoris*, and in the other *de bonis propriis*. Hob. 88. *Herrenden* v. *Palmer*. 2 Lev. 228. *Hall* v. *Huſſam*. Therefore a count for money had and received by the defendant *as executor* for the plaintiff's uſe, or for money lent him *as ſuch*, or on an *inſimul computaſſet* of money due from him *as ſuch*, cannot be joined to a count on a promiſe made by the teſtator. And ſuch misjoinder of action either by or againſt an executor, is a defect in ſubſtance, and therefore bad on a general demurrer, or in arreſt of judgment, or on error. 4 Term Rep. 347. *Jennings* v. *Newman*. 1 H. Black. 108. *Roſe* v. *Bowler*. 2 Boſ. & Pull. 424. *Brigden* v. *Parkes*. See the reaſon thereof *poſtea* 210. 210. *a*. in the note. But a count on an account ſtated with an executor *for money due from the teſtator*, may be joined to a count on a promiſe made by the teſtator. 1 H. Black. 102. *Secar* v. *Atkinſon*; this being the common mode of declaring againſt executors, to ſave the ſtatute of limitations. So a man cannot join *treſpaſs*, and *treſpaſs on the caſe* in the ſame action, for they are two diſtinct things and of different natures, and the judgments are different; for in treſpaſs the judgment is *quod capiatur*, and in treſpaſs on the caſe, *quod ſit in miſericordiâ*. 1 Ld. Raym. 273, 274. *Courtney* v. *Collet*. The reſult of all theſe caſes ſeems to be, that wherever the ſame plea may be pleaded, and the ſame judgment given in all the counts of the declaration; or whenever the counts are of *the ſame nature*, and the ſame judgment is given on them all, though the pleas be different, as in the caſe of debt upon bond and on a *mutuatus* already mentioned, they may well be joined.

(3) The ſame objection was taken in Hob. 189. *Harbin* v. *Green*. Moor, 887. S. C. and recognized in Willes's Rep. 657. *Drake* v. *Wigleſworth*, where a cuſtom for the inhabitants to grind *all their grain whatſoever* by them ſpent *or ſold* in their ſaid meſſuages at the plaintiff's mills, and not elſewhere, was held to be void: for by that cuſtom, if a man bought corn he could not ſell it again in corn in his houſe, for he muſt firſt grind it at theſe mills; and the breach was aſſigned as well in corn ſold as ſpent; and Lord *Hobart* was of opinion, that if the plaintiff had aſſigned it only in corn *ſpent*, it would not have ſerved. See Doug. 221. *Cot* v. *Berbeck*. The pleading in this caſe ſhould have been, "all the corn and grain *after* "*the grinding thereof*, or *ground*, *and* "*ſpent*, &c." But it is a good cuſtom that all the houſeholders and occupiers of dwelling-houſes in the pariſh of A., ſhall grind at the plaintiff's mill all their corn which ſhall be uſed by them ground within the pariſh, although the inhabitants are not tenants. 1 Roll. Abr. 559. pl. 4. *Higges* v. *Gardener*. Willes's Rep. 654. *Drake* v. *Wigleſworth*.

Caſe 21. Chandler *verſus* Vilett.

Hil. 21 & 22 Car. II. Regis. Rot. 1297.

WILTSHIRE, to wit; Be it remembered that heretofore, to wit, in the term of *St. Michael* laſt paſt, before our lord the king at *Weſtminſter* came *Thomas Chandler*, who is within the age of twenty-one years, by *John Ridley* his guardian ſpecially admitted by the court here, and brought here into the court of our ſaid lord the king then there his certain bill againſt *Richard Vilett* gent. in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, which ſaid bill follows in theſe words, to wit: *Wiltſhire*, to wit, *Thomas Chandler*, who is within the age of twenty-one years, by *John Ridley* his guardian ſpecially admitted by the court here (1),

(1) If an infant ſues or defends by his *guardian*, the guardian muſt have a warrant, though if he ſues by his *prochein amy* or next friend, the *prochein amy* need not; but both the guardian and *prochein amy* muſt be admitted by the court. F. N. B. 63. I. 7th edit. 2 Inſt. 261. 3 Mod. 236. *Fitzgerald* v. *Villiers*. Cro. Car. 86. *Young* v. *Young*. See the form of the rule or order for the admiſſion. Tidd's Prac. Forms, 6, 7, 8. 2 Sell. Prac. 66, 67. Imp. C. P. 625—628. 4th edit. And if the infant ſues by guardian or *prochein amy*, without ſaying in the declaration "by the court "here ſpecially admitted," it is error. 1 Lev. 224. *Combers* v. *Watton*. But the inſertion of thoſe words in the declaration is holden to be ſufficient, though there be no admiſſion of the guardian, or *prochein amy*, on the roll. 4 Rep. 53. b. 54. a. *Rawlyn*'s caſe. 1 Sid. 173. *Swift* v. *Nott*; for it is no error, but only a miſdemeſnor in the agent who is employed in the cauſe. If however in fact there be an admiſſion of the *prochein amy* or guardian by the court, but it is not entered of record, the court will give leave to enter it. Cro. Car. 86. *Young* v. *Young*. S. C. Hutt. 92. 1 Lev. 224. *Combers* v. *Watton*. If an infant ſues by guardian or *prochein amy*, he cannot afterwards remove his guardian, or diſavow the action of his *prochein amy*. F. N. B. 63. K. 7th edit. but an infant may either have a writ out of the court of chancery to remove him, or, which is the uſual courſe, may apply to the court who may remove him at their diſcretion. Ibid. Cro. Car. 161. *Goodwin* v. *Moore*. Though the names of guardian and *prochein amy* are often uſed indiſcriminately, and an infant may *ſue* either by one or the other, yet in practice an infant plaintiff generally ſues by his *prochein amy*, but an infant defendant muſt in all caſes appear and defend by his

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complains of *Richard Vilett* gent. being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, for that whereas the ſaid *Richard*, on the 1ſt day of *May* in the 17th year of the reign of our lord *Charles* the ſecond now king of *England*, &c. at *Highworth* in the ſaid county, was indebted to the ſaid *Thomas* in 50l. of good and lawful money of *England*, for money by the ſaid *Richard* before that time had and received to the uſe of the ſaid *Thomas*, and being ſo indebted, he the ſaid *Richard* in conſideration thereof undertook, and then and there faithfully promiſed the ſaid *Thomas*, that he the ſaid *Richard* would well and faithfully pay and ſatisfy the ſaid 50l. to the ſaid *Thomas*. And whereas alſo the ſaid *Richard* afterwards, to wit, on the ſaid 1ſt day of *May* in the 17th year aforeſaid, at *Highworth* aforeſaid in the county aforeſaid, was indebted to the ſaid *Thomas* in 12l. of like lawful money, for other money by the ſaid *Richard* before that time likewiſe had and received to the uſe of the ſaid *Thomas*, and being ſo indebted he the ſaid *Richard* in conſideration thereof undertook, and then and there faithfully promiſed the ſaid *Thomas*, that he the ſaid *Richard* would well and faithfully pay and ſatisfy the ſaid 12l. to the

Indebitatus aſſumpſit, for money had and received.

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2d count, alſo for money had and received.

his *guardian*. Co. Litt. 135. b. 2 Inſt. 261. 2 Str. 784. *Freſcobaldi* v. *Kinaſton*.

The rule or order for the admiſſion of a *prochein amy* ſhould be obtained *before declaration*, and a copy thereof annexed to it, otherwiſe the defendant is not compellable to plead. Sty. Pr. Reg. 264. And the attorney for the plaintiff, if required muſt give notice to the defendant's attorney, of the place of abode of the *prochein amy*. 1 Wilſ. 246. *Tomlin* v. *Brookes*. In like manner the rule or order for the admiſſion *of a guardian*, ſhould be obtained before *plea*, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in conſequence of common proceſs with a notice requiring him to appear in that manner, the plaintiff may obtain an order for ſtriking out the appearance, and that the defendant may appear by guardian within a certain time, or in default thereof, that the plaintiff may be at liberty to name a guardian to appear and defend for him. Barnes, 413. *Kerry* v. *Cade*. 418. *Gladman* v. *Bateman*. And a ſimilar order may be obtained where the defendant neglects to appear at all. 2 Str. 1076. *Stone* v. *Atwell*, 2 Wilſ. 50. *Shipman* v. *Stevens*.

ſaid

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Breach.

ſaid *Thomas* (2). Yet the ſaid *Richard*, not regarding his ſaid ſeveral promiſes and undertakings, but contriving and fraudulently intending craftily and ſubtilely to deceive and defraud the ſaid *Thomas* in this behalf, has not paid the ſeveral ſums, amounting in the whole to 62l., to the ſaid *Thomas*, nor has he in anywiſe ſatisfied him for the ſame (although to do this he the ſaid *Richard* afterwards, to wit, on the 1ſt day of *Auguſt* in the 21ſt year of the reign of our ſaid lord the now king, at *Highworth* aforeſaid in the county aforeſaid, was requeſted by the ſaid *Thomas* (3), but to pay him the ſame has hitherto altogether refuſed and ſtill refuſes, to the damage of the ſaid *Thomas* of 80l., and therefore he brings ſuit, &c.

Plea. Imparlance.

And now at this day, to wit, on *Monday* next after the octave of *St. Hilary* in this ſame term, until which day the ſaid *Richard Vilett* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter* comes as well the ſaid *Thomas Chandler* by his guardian aforeſaid, as the ſaid *Richard Vilett* by *William Hewes* his attorney, and the ſaid *Richard* defends the wrong and injury when, &c. and ſays that the ſaid *Thomas* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, that the ſaid *Thomas*, on the 23d day of *October* in the 21ſt year of the reign of our ſaid lord the now king, exhibited his ſaid bill againſt the ſaid *Richard*, and that he the ſaid *Richard* at any time within ſix years next before the day of the exhibiting of

Non aſſumpſit infra ſex annos.

(2) According to the preſent mode of declaring, theſe two ſums of 50l. and 12l. would be included in *one count*, ſtating that the defendant was indebted to the plaintiff in a certain ſum of money more than ſufficient to comprehend theſe ſums; as in this caſe, "that the ſaid "(defendant) on, &c. at, &c. was in- "debted to the ſaid (plaintiff) in 100l. "(for inſtance) of good and lawful, &c. "for ſo much money by the ſaid (de- "fendant) before that time had and re- "ceived to the uſe of the ſaid (plain- "tiff), and being ſo indebted, &c." and the plaintiff upon this count would now recover theſe two ſums of 50l. and 12l. if he proved that the defendant had at different times received them for his uſe.

(3) As this declaration is for a preceding debt, or duty, there is no neceſſity to lay a time and place of requeſt as is done here, but the general allegation of, "although often requeſted," is holden to be ſufficient; for the bringing of the action is a ſufficient requeſt. 1 Saund. 33. *Birks* v. *Trippet*.

the

the ſaid bill did not undertake in manner and form as the ſaid *Thomas* has above thereof complained againſt him. And this he is ready to verify. Wherefore he prays judgment if the ſaid *Thomas* ought to have or maintain his ſaid action thereof againſt him, &c.

Replication.

And the ſaid *Thomas* ſays, that he, by any thing by the ſaid *Richard* above in pleading alleged, ought not to be barred from having his ſaid action thereof againſt him, becauſe he ſays that he the ſaid *Thomas* at the time of making the ſeveral promiſes and undertakings aforeſaid, and alſo on the day of exhibiting the ſaid bill of the ſaid *Thomas*, to wit, on the ſaid 23d day of *October* in the 21ſt year aforeſaid, was within the age of twenty-one years, to wit, at *Highworth* in the ſaid county. And this he is ready to verify; wherefore he prays judgment and his damages on occaſion of the premiſes to be adjudged to him, &c.

Plaintiff, at the time of making the ſaid promiſes, and of the commencement of this ſuit, was an infant.

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General demurrer to the replication, and a joinder in demurrer.

But becauſe the court of our lord the king here is not yet adviſed what judgment to give of and upon the premiſes, a day is therefore given to the parties aforeſaid before our lord the king at *Weſtminſter*, until *Friday* on the morrow of the Aſcenſion, to hear their judgment of and upon the premiſes, for that the court of our ſaid lord the king here is not yet adviſed thereof, &c.

Curia adviſare vult.

At which day, before our lord the king at *Weſtminſter*, come the parties aforeſaid by their attornies aforeſaid, whereupon all and ſingular the premiſes being ſeen, and by the court of our ſaid lord the king more fully underſtood, and mature deliberation thereupon had, for that it appears to the court of our ſaid lord the king now here, that the plea aforeſaid by him the ſaid *Thomas* in manner and form aforeſaid above in replying pleaded, and the matter in the ſame contained, are good and ſufficient in law for him the ſaid *Thomas* to have his ſaid action thereof maintained againſt the ſaid *Richard*, it is conſidered that the ſaid *Thomas Chandler ought* to recover his damages againſt the ſaid *Richard* on occaſion of the ſaid premiſes: but becauſe it is unknown to the court of our ſaid lord the king now here, what damages the ſaid

Judgment for plaintiff.

Writ of inquiry awarded.

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Thomas has ſuſtained on occaſion of the ſaid premiſes, the ſheriff is therefore commanded that, by the oath of good and lawful men of his bailiwick, he diligently inquire what damages the ſaid *Thomas* has ſuſtained, as well on occaſion of the ſaid premiſes, as for his coſts and charges by him about his ſuit in this behalf expended, and ſend the inquiſition which he ſhall take thereon to our lord the king at *Weſtminſter*, on *Friday* next after the morrow of the *Holy Trinity*, under his ſeal, and the ſeals of thoſe by whoſe oath he ſhall take that inquiſition, together with the writ of our ſaid lord the king to him therefore directed; the ſame day is given to
[120] the ſaid *Thomas*, there, &c. At which day, before our lord the king at *Weſtminſter*, comes the ſaid *Thomas* by his attorney aforeſaid, and the ſheriff of the county of *Wilts*, to wit, *John Hall* eſq. by virtue of the writ of our ſaid lord

The ſheriff returns the inquiſition

the king to him thereof directed, returns a certain inquiſition taken before him at *Swindon* in the county aforeſaid, on the 2d day of *June* in the 22d year of the reign of our lord *Charles* the ſecond now king of *England*, &c. by the oath of twelve good, &c. by which it is found that the ſaid *Thomas Chandler* ſuſtained damages on occaſion of the ſaid premiſes, beſide his coſts and charges by him about his ſuit in that behalf expended, to 65l., and for thoſe coſts and charges to

and final judgment thereon.

40s. Therefore it is conſidered that the ſaid *Thomas Chandler* recover againſt the ſaid *Richard Vilett* the damages aforeſaid, by the inquiſition aforeſaid above in form aforeſaid found, and alſo 5l. for his ſaid coſts and charges adjudged of increaſe to the ſaid *Thomas* by the court of our ſaid lord the king now here with his aſſent; which ſaid damages in the whole amount to 72l. And the ſaid *Richard* in mercy, &c.

Chandler *verſus* Vilett. Caſe 21.

Hil. 21 & 22 Car. 2. Regis. Rot. 1297.

Assumpsit by *Chandler* an infant by his guardian againſt *Vilett*; the plaintiff declares upon two promiſes that the defendant was indebted to him in 50l. and 12l. for monies by the ſaid defendant before that time had and received to the uſe of the plaintiff, and being ſo indebted the defendant promiſed to pay thoſe monies and had not paid them, wherefore he brought his action: the defendant pleads in bar *non aſſumpſit infra ſex annos*: to which the plaintiff replies, that at the time of the promiſes, and alſo at the time of exhibiting the bill, he was and ſtill is an infant within the age of 21 years; to which the defendant demurs in law.

S. C. 1 Sid. 45. The privileges by reaſon of infancy and other impediments are ſaved, *in an action on the caſe on aſſumpſit*, by the ſtatute 21 Jac. 1. c. 16 of limitations, and that action is within the equity of the ſaving clauſe thereof, though it is named in the limiting clauſe only.

And it was objected by *G. Strode* of *Lincoln's Inn*, that this action was limited by the ſtatute of limitations of 21 Jac. 1. c. 16. to be brought within ſix years, and the privilege of infancy is not ſaved by the ſtatute in this action; for in the reſtraining and limiting part of the ſtatute (*d*), this action upon the caſe is limited to ſix years, and it is not excepted in the ſaving clauſe of the act (*e*); for the words are, "Provided nevertheleſs, and be it further enacted, that if any perſon or perſons that is or ſhall be entitled to any ſuch action of treſpaſs, detinue, action for trover, replevin, actions of accompts, actions of debt, actions of treſpaſs for aſſault, menace, battery, wounding, or impriſonment, actions upon the caſe for words, be or ſhall be, at the time of any ſuch cauſe of action given or accrued, fallen or come, within the age of 21 years, feme covert, non compos mentis, impriſoned, or beyond the ſeas; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſuch times as are before limited, after their coming to, or being, of full age, diſcovert, of ſane memory, at large, and returned from beyond the ſeas, as other perſons having no ſuch impediment ſhould have done." Wherefore no actions *on the caſe* are ſaved and excepted by reaſon of infancy out of the body of the act, except only actions on the caſe for

(*d*) Sect. 3.

(*e*) Sect. 7.

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words. And all other actions on the caſe are limited within the body of the act, and are not ſaved or excepted in the caſe of infancy by the ſaving clauſe; and therefore he concluded that the plaintiff ſhould be barred.

Sed non allocatur; for by the court, this action on the caſe is within the equity of the ſaving clauſe of the act, though it be not expreſſed; for the intention of the ſtatute was not to preſerve a trivial action on the caſe *for ſlanderous words* in reſpect of infancy, and not to ſave for the infant an action *for a real duty*, as in this caſe; wherefore it was adjudged for the plaintiff (4).

Note;

(4) The ſame point was determined in the Common Pleas in a ſubſequent caſe, 2 Mod. 71 *Croſier* v. *Tomlinſon*, where the court ſaid, "that upon the "whole frame of the act it was ſtrong "againſt the defendant, for it would be "very ſtrange that the plaintiff might "bring an action of *debt*, and not of "*indebitatus aſſumpſit*. When the ſcope "of an act appears to be in a general "ſenſe, the law looks to the meaning, "and it is to be extended to particular "caſes within the ſame reaſon; and "therefore they were of opinion, that "actions *of treſpaſs* mentioned in the "ſtatute are comprehenſive of this ac-"tion, becauſe it is a treſpaſs upon the "caſe; and the words of the proviſo "ſave the infant's right in actions of "treſpaſs. And though there are par-"ticular words in the enacting clauſe "which relate to the action, yet this "proviſo reſtrains the ſeverity of that "clauſe, and reſtores the common law, "and ſo is to be taken favourably; "and this action, being within the "ſame reaſon with other actions therein "mentioned, ought alſo to be within the "ſame remedy." See alſo Fitzg. 81. So where the defendant pleaded to an action of trover, that the cauſe of action did not accrue to the plaintiff within ſix years, and the plaintiff replied that he was beyond ſea, and upon a demurrer to the replication it was objected, that the action of trover was omitted out of the ſtatute; for though the firſt words of the third ſection of the ſtatute are, that an action of trover (among others mentioned therein) ſhall be brought within the time hereafter expreſſed, yet in the enumerating of the actions in the ſubſequent part of the ſection limiting them to particular times, the action of trover is omitted; but all the court conceived, that notwithſtanding ſuch omiſſion, the action of trover was implied in the general words of "actions upon the caſe," and therefore they overuled the objection. Cro. Car. 245. *Swayn* v. *Stephens*. See alſo 3 Bac. Abr. 513. It was holden by Lord *Holt*, that *Dublin*, or any other place in *Ireland*, is beyond ſea within this ſtatute. 1 Show. 91. *Anon.* If the plaintiff be in *England* at the time the cauſe of action accrues, the time of limitation begins to run, ſo that if he,

Note; it was ſaid, that the infant ſhould have waited until his full age, becauſe the ſix years were elapſed during his infancy, and therefore he could only purſue his action according to the words of the ſaving clauſe of the act, which is in ſix years *after his full age*; but this was not regarded by the court. And it ſeems to me that he may well purſue his action at any time within age, although the ſix years are elapſed: See for this the caſe of non claims in fines, 2 Inſt. 519. *Cotton*'s caſe (5). CHANDLER v. VILETT.

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or his perſonal repreſentative, does not commence an action within ſix years, they are barred by the ſtatute. 1 Wilſ. 134. *Smith* v. *Hill*. So if *one* plaintiff be abroad, and the others in *England*, the action muſt be brought within ſix years after the cauſe of action ariſes. 4 Term Rep 516. *Perry* v. *Jackſon*

By 4 Ann. c. 16. ſ 17, 18. it is enacted, that all ſuits and actions in the court of admiralty for ſeamen's wages ſhall be commenced within ſix years next after the cauſe of ſuch ſuits or actions ſhall accrue, and not after, with a proviſo in favour of the plaintiff's infancy, coverture, impriſonment, or reſidence beyond the ſeas at the time the cauſe of action accrued.

It ſeems to have been the better opinion, that the exception in the ſtatute 21 Jac. 1. c. 16., in favour of perſons being beyond ſea, extends only to the caſe where the *creditors* or *plaintiffs* were ſo abſent, and not where the *debtors* or *defendants* were, becauſe *creditors* are only mentioned in the ſtatute. 1 Show. 99. *Hall* v. *Wyborn* 3 Bac. Abr. 514. But now by the before mentioned ſtatute 4 Ann. c. 16. ſ. 19. it is enacted, that if any perſon *againſt whom* any action lies for ſeamen's wages, treſpaſs, detinue, trover, replevin, action of account, or upon the caſe, (or other actions mentioned in 21 Jac. 1. c. 16. ſ. 3.) was beyond ſea at the time that ſuch action accrued, the *plaintiff* ſhall be at liberty to bring his action againſt him within the ſame time after his return, as is limited for ſuch action by the ſtatute of 21 Jac. 1. c. 16. and 4 Ann. c. 16.

(5) So the words of the ſtatute 4 H. 7 c. 24. of fines are, "that infants and "their heirs ſhall take their action or "entry within five years next after they "are of the full age of 21 years;" but ſtill it has been reſolved, that an infant may, if he pleaſes, enter, or have his action, before he attains his full age, and avoid the fine. Plow. 366. a. *Stowel* v. *Zouch*. 1 Leon. 215. *Cotton*'s caſe. There is a difference in *Cotton*'s caſe as reported in 2 Inſt. 519 and in 1 Leon 211. Lord *Coke* reports the determination of that caſe to have been that where a perſon is beyond ſea at the time when a fine is levied, and never returns, he is within the exception made in the body of the act of 4 H. 7. and his heir may enter or take his action *at any time*; but in caſe he does return, he or his heir muſt enter within five years after his return; and that where an infant, not being party to a fine,

and having a preſent right, dies during his infancy, his heir may enter or take his action at any time, and that the ſame takes place with reſpect to a man *non compos*, who dies in that ſituation, or to a man in priſon who dies before he recovers his liberty, or to a married woman who dies in the lifetime of her huſband; for all theſe are within the reaſon adjudged of a perſon who is out of the realm, but never returns. But in *Leonard*'s report of *Cotton*'s caſe, *Anderſon* chief juſtice is reported to have ſaid, that although the perſon who has right is beyond ſea at the time of the fine levied, and dies beyond ſea, yet his heir is bound to enter or bring his action within five years *after the death of his anceſtor*, provided he is of full age and without impediment, for otherwiſe he ſhall be for ever barred. And the laſt reſolution upon the ſubject is agreeable to the opinion of *Anderſon*. That caſe was, that the anceſtor died ſeiſed of certain premiſes leaving a feme covert his heir at law; upon his death a ſtranger made a tortious entry into the premiſes, and was ſeiſed, and levied a fine with proclamations: The feme covert died while *under coverture*, no entry having been made on her behalf to avoid the fine, leaving one A B. her heir, who laboured under none of the impediments mentioned in the ſtatute 4 H. 7. of fines: it was adjudged that the fine was a bar to the right of A B. the heir, unleſs he purſued his right within five years after the death of his anceſtor who died under coverture. And the court ſaid that the true meaning of the ſtatute was, that the rights of thoſe perſons who were under diſabilities, and of their heirs, were ſaved, as long as the diſabilities continued and five years after, but no longer; therefore the heir, not being himſelf diſabled, was barred, unleſs he purſued his right within five years after it accrued by the death of his anceſtor under a diſability, and conſequently the heir, who was the plaintiff in that caſe, not having done ſo, was prevented by the fine from recovering the lands in queſtion. 2 H. Blac. 584. *Dillon* v. *Leman*. See 4 Term Rep. 300. *Doe* v *Jones*, and *Doe* v. *Shane*, Ibid. 306. note (*b*).

Caſe 22.

Webber *verſus* Tivill.

Trin. 21. Car. II. Regis. Rot. 715.

Declaration in aſſumpſit by a ſurviving partner.

LONDON, to wit. BE it remembered that heretofore, to wit, in the term of St. Hilary laſt paſt, before our lord the king at *Weſtminſter* came *John Webber* merchant, by *George Hill* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *John Tivill* merchant

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merchant in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *London*, to wit, *John Webber* merchant complains of *John Tivill* merchant, being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, for that whereas the ſaid *John Tivill*, on the 20th day of *September* in the year of our Lord 1663, at *London*, to wit, in the pariſh of *St. Mary le Bow* in the ward of *Cheap*, *London*, was indebted to the ſaid *John Webber* and one *Robert Pearſon* now deceaſed, whom he the ſaid *John* has ſurvived (1), in 1000l. of lawful money of *England*, as well for the money of the ſaid *John Webber* and *Robert Pearſon* by the ſaid *John Tivill* before that time received and had, as for divers goods and merchandizes by the ſaid *John Webber* and *Robert Pearſon* before that time ſold and delivered, and the ſaid *John Tivill*, being ſo thereof indebted, in conſideration thereof, undertook and faithfully promiſed the ſaid *John Webber* and *Robert Pearſon*, that he the ſaid *John Tivill* would well and faithfully pay and content the ſaid 1000l. to the ſaid *John Webber* and *Robert Pearſon* (2). And whereas alſo the ſaid

1ſt count, as well for money had and received, as for goods ſold and delivered.

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2d count, on an account ſtated.

(1) It is neceſſary that all the perſons with whom a contract has been made, if living, ſhould join in the action, and if any of them are dead, that fact ſhould be ſtated, as in this caſe. See 1 Saund. 291. f. *Cabell* v. *Vaughan*.

(2) Hence it appears, that the common counts in a declaration may be contained in *one count*, ſtating that the defendant was indebted to the plaintiff in a given ſum (large enough to comprehend all the money which the plaintiff can poſſibly recover,) in 1000l. for inſtance, as well for goods ſold and delivered by the plaintiff to the defendant, as for money lent and advanced, and money paid by the plaintiff to the defendant, and money had and received by the defendant for the plaintiff, and that in conſideration thereof, the defendant promiſed to pay; Cro. Jac. 245. *Rooke* v. *Rooke*; and it ſhould ſeem, that it is not neceſſary for the plaintiff to prove all the different cauſes of action ſo included in the ſame count, or in other words, to prove the whole conſideration laid in order to entitle himſelf to recover, any more than it is when they are contained in different counts; but if he proves any one or more of the different cauſes of action, it is enough; for the defendant *being indebted to the plaintiff for any one cauſe*, appears to be a ſufficient conſideration

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ſaid *John Tivill* afterwards, to wit, on the ſame day and year, to wit, at *London* aforeſaid, to wit, in the pariſh and ward aforeſaid, accounted together with the ſaid *John Webber* and *Robert Pearſon*, concerning divers other ſums of money before that time due from the ſaid *John Tivill* to the ſaid *John Webber* and *Robert Pearſon*, and then being in arrear and unpaid, and upon that account the ſaid *John Tivill* was found in arrear to the ſaid *John Webber* and *Robert Pearſon* in 55l. 11s. 7d. (3) of like lawful money of *England*, in conſideration whereof he

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for the promiſe (which the law raiſes) of the defendant to pay that money. It was formerly holden that upon a count for goods ſold and delivered, the plaintiff was bound to prove more than *one* particular thing ſold, (though he may now recover for one thing only:) and alſo to prove a *price* agreed upon, otherwiſe the plaintiff would fail. So upon a count for work and labour, uſe and occupation, and other counts of the like nature, the plaintiff was bound to prove a price, or ſum of money, agreed upon; and therefore where the plaintiff could only prove the delivery of the goods, or the doing of the work, or the occupation of the eſtate by the defendant and the like, without any price or ſum agreed upon to be paid to the plaintiff, he was obliged to declare upon a *quantum valebant*, or a *quantum meruit*. But this ſtrictneſs is now relaxed, and the preſent practice ſeems to be, that the plaintiff may, upon a count for goods ſold and delivered, work and labour, uſe and occupation, and the like, recover what he ſhall prove to be due to him, notwithſtanding there was not any price or ſum of money agreed upon; though on the other hand, where the contract is for a certain price or ſum of money, it ſeems to be underſtood, that the plaintiff cannot recover upon a count on a *quantum valebant*, or *quantum meruit*. And indeed theſe laſt mentioned counts ſeem now to be of little or no uſe, ſo that, it ſeems, it is not often neceſſary to inſert them in the declaration. Therefore, when the common counts are added to one or more ſpecial ones, for which the action is principally brought, there to prevent an unneceſſary length in the record, and the expence unavoidably attending it, it will perhaps be a very proper practice to include the common counts in the ſame count, as is done here.

(3) The reaſon of laying this preciſe ſum was, becauſe at the time when this declaration was drawn, and indeed till within a few years ago, the plaintiff was obliged to ſtate in his declaration, and prove, the *exact* ſum agreed upon by both parties to be due, and alſo the very day of the account, otherwiſe the plaintiff would have been nonſuited; but this opinion is now exploded, and the plaintiff may, at preſent, recover *part* of the ſum laid on this count, as well as on any other, and prove the account to have been on any day before the action was commenced. Bull. *Niſ. Pri.*

he the ſaid *John Tivill* afterwards, to wit, on the ſame day and year, at *London* aforeſaid, to wit, in the pariſh and ward aforeſaid, undertook and then and there faithfully promiſed the ſaid *John Webber* and *Robert Pearſon*, that he the ſaid *John Tivill* would well and faithfully pay and content the ſaid 55l. 11s. 7d. to the ſaid *John Webber* and *Robert Pearſon*. Yet the ſaid *John Tivill* not regarding his ſaid ſeveral promiſes and undertakings in form aforeſaid made, but contriving and fraudulently intending craftily and ſubtily to deceive and defraud the ſaid *John Webber* and *Robert Pearſon* in the life time of the ſaid *Robert Pearſon*, and the ſaid *John Webber* after the death of the ſaid *Robert Pearſon*, in this behalf, has not yet paid the ſaid ſeveral ſums of money, amounting in the whole to 1055l. 11s. 7d., or any part thereof to the ſaid *John Webber* and *Robert Pearſon*, or either of them, in the life time of the ſaid *Robert Pearſon*, or to the ſaid *John Webber* after the death of the ſaid *Robert Pearſon*, according to his ſaid promiſes and undertakings in form aforeſaid made, nor has he hitherto in any manner contented the ſaid *John Webber* and *Robert Pearſon*, or either of them, for the ſame, (although to do this afterwards, to wit, on the 1ſt day of *Auguſt* in the 20th year of the reign of our lord *Charles* the Second now king of *England*, &c. at *London* aforeſaid, to wit, in the pariſh and ward aforeſaid, was by the ſaid *John Webber* and *Robert Pearſon* in the life time of the ſaid *Robert Pearſon* and by the ſaid *John Webber* after the death of the ſaid *Robert Pearſon*, thereto requeſted) (4), but to pay the ſaid 1055l. 11s. 7d. to [123] the ſaid *John Webber* and *Robert Pearſon* in the life time of the ſaid *Robert Pearſon*, and to the ſaid *John Webber* after the death of the ſaid *Robert Pearſon*, he the ſaid *John Tivill* has altogether refuſed and ſtill refuſes to pay the ſame to the ſaid *John Webber*; wherefore the ſaid *John Webber* ſays he is injured, and has ſuſtained damage to the value of 1200l. and therefore he brings ſuit, &c.

B. each.

Pri. 129. Wherefore the preſent practice is, not to lay a preciſe ſum in the declaration, but any ſum large enough to cover the demand, as is done in other counts upon an *indebitatus aſſumpſit*.

(4) Here too it is unneceſſary to lay a time and place of requeſt; the general allegation of *licet ſepius requiſitus* being deemed to be ſufficient. See *ante*, 118. note 3.

And

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Plea.

Non aſſumpſit infra ſex annos.

And now at this day, to wit, on *Friday* next after the morrow of the holy Trinity in the ſame term, until which day the ſaid *John Tivill* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter* comes as well the ſaid *John Webber* by his attorney aforeſaid, as the ſaid *John Tivill* by *John Fox* his attorney, and the ſaid *John Tivill* defends the wrong and injury when, &c. and ſays that he the ſaid *John Webber* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays, *that the ſaid bill of the ſaid John Webber was exhibited againſt him the ſaid John Tivill in the ſaid court of our ſaid lord the king before the king himſelf at Weſtminſter, on the 23d day of January in the 20th year of the reign of our lord Charles the 2d now king of England, &c. and not before* (5), and that he the ſaid *John Tivill* did not undertake at any time within ſix years next before the ſaid day of exhibiting the ſaid bill of the ſaid *John Webber* in manner and form as the ſaid *John Webber* has above thereof declared againſt him the ſaid *John Tivill*. And this he is ready to verify; wherefore he prays judgment if the ſaid *John Webber* ought to have or maintain his ſaid action thereof againſt him, &c.

Replication

that the money in the ſaid ſeveral undertakings mentioned wholly concerned the trade of merchandize.

And the ſaid *John Webber* ſays that he, by any thing by the ſaid *John Tivill* above in pleading alleged, ought not to be barred from having his ſaid action thereof againſt the ſaid *John Tivill*, becauſe he ſays, that the ſaid money in the ſeveral promiſes and undertakings aforeſaid above mentioned, at the time of the making of the promiſes and undertakings aforeſaid, became due and payable on trade had between the ſaid *John Webber*, *Robert Pearſon*, and the ſaid *John Tivill*, as merchants, and wholly concerned the trade of merchandize, to wit, at *London* aforeſaid in the pariſh and ward aforeſaid. And this he is ready to verify; wherefore he prays judgment

(5) The preſent form of pleading *non aſſumpſit infra ſex annos*, is to omit the words in italicks, and to aver ſimply, "that the ſaid (defendant) did not undertake and promiſe at any time "within ſix years next before the day "of exhibiting the ſaid bill of the ſaid "(plaintiff) in K. B., or, of ſuing out "of the original writ of the ſaid (plaintiff) in C. B., in manner and form as "the ſaid (plaintiff) has above thereof "complained againſt him; and this, &c. "wherefore, &c."

and

and his damages on occaſion of the premiſes to be adjudged to him, &c. WEBBER v. TIVILL.

And the ſaid *John Tivill* ſays, that the plea aforeſaid by the ſaid *John Webber* in manner and form aforeſaid above in replying pleaded, and the matter in the ſame contained, are not ſufficient in law for the ſaid *John Webber* to have his ſaid action thereof maintained againſt the ſaid *John Tivill*; to which the ſaid *John* has no neceſſity, nor is he bound by the law of the land in anywiſe to anſwer. And this he is ready to verify: wherefore for want of a ſufficient replication in this behalf, he the ſaid *John Tivill*, as before, prays judgment, and that the ſaid *John Webber* may be barred from having his ſaid action thereof againſt the ſaid *John Tivill*, &c. Demurrer. [124]

And the ſaid *John Webber* ſays, that the plea aforeſaid by the ſaid *John Webber* in manner and form aforeſaid above in replying pleaded, and the matter in the ſame contained, are good and ſufficient in law for the ſaid *John Webber* to have his ſaid action thereof maintained againſt the ſaid *John Tivill*; which ſaid plea and the matter in the ſame contained he the ſaid *John Webber* is ready to verify and prove as the court, &c. and becauſe the ſaid *John Tivill* does not anſwer the ſaid plea, nor in anywiſe deny the ſame, he the ſaid *John Webber*, as before, prays judgment, and his damages on occaſion of the premiſes to be adjudged to him, &c. Joinder.

But becauſe the court of our lord the king now here is not adviſed what judgment to give of and upon the premiſes, a day is therefore given to the parties aforeſaid before our lord the king at *Weſtminſter*, until next after to hear their judgment of and upon the premiſes, becauſe the court of our lord the king is thereof not yet adviſed, &c. *Curia adviſare vult.*

Caſe 22.

Webber *verſus* Tivill.

Trinity, 21 Car. 2. Regis. Rot. 715.

S. C. 2 Keb. 621. 634. 1 Lev. 287. S. C. cited 1 Vent 90. The exception in the ſtatute of limitations 21 Jac. 1. c. 16. ſ. 3. of accounts which concern merchandize, that they ſhall not be limited, extends only to accounts *current* between merchants, but not to accounts *ſtated* between them.

ASSUMPSIT by *Webber* merchant againſt *Tivill* merchant; the plaintiff declares that the defendant, on the 20th of *September* 1663, was indebted to the plaintiff and one *Pearſon* deceaſed, whom the plaintiff has ſurvived, in 1000l., as well for money of the plaintiff and the ſaid *Pearſon* by the defendant before then received and had, as for divers goods and merchandizes by the ſaid plaintiff and *Pearſon* ſold and delivered to the ſaid defendant, and that the defendant being ſo indebted promiſed to pay the ſaid ſum. The plaintiff declares alſo, that the defendant had accounted with the ſaid plaintiff and the ſaid *Pearſon* for money due from the defendant to the plaintiff, and the ſaid *Pearſon* in arrear and unpaid and upon ſuch account the defendant was found in arrear in 55l. 11s. 7d. and being ſo found in arrear he promiſed to pay the ſaid ſum; yet the ſaid defendant has not yet paid the ſaid ſeveral ſums in the life time of *Pearſon*, or after his death to the plaintiff, wherefore he brought this action.

The defendant pleads the common plea of the ſtatute of limitations, namely, "that he did not undertake within ſix years next before the exhibiting of the bill, and this, &c. wherefore, &c."

The plaintiff replies, that the monies in the ſeveral promiſes mentioned at the time of making the ſaid promiſes be-

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came due and payable on trade between the ſaid plaintiff and *Pearſon* and the ſaid defendant as merchants, and wholly concerned merchandize: and this, &c. wherefore, &c. upon which the defendant demurred in law. And the queſtion was, whether this debt for which the plaintiff has declared in manner aforeſaid be excepted out of the ſtatute of limitations of 21 Jac. 1. c. 16. or not, the words of which are, "And be it further enacted, that all actions of treſpaſs, detinue, actions for trover and replevin for taking away of goods and cattle, all actions of account, and upon the caſe, *other than ſuch accounts as concern the trade of merchandize between merchant*

chant and merchant, their factors or ſervants, all actions of debt, grounded upon any lending or contract without ſpecialty, &c." ſhall be ſued within the ſeveral times preſcribed in the ſaid act, &c.

And *Jones* for the defendant argued, that this caſe is not excepted out of the ſtatute; for the ſtatute intends to except nothing concerning merchandize between merchants but only accounts *current* between them. And the reaſon was, becauſe it often happens that merchants, who are as partners, or hold correſpondence one with the other in ſeveral parts of the world, may have accounts current between them for ſeveral years before they have an opportunity of meeting to ſtate their accounts, and therefore the ſtatute does not mean to limit ſuch accounts. But here it appears that the account for the 55l. 11s. 7d. was *ſtated* and agreed, and then immediately it becomes a debt certain, being aſcertained by the account, and continually afterwards remains as a dead debt, and there is no continuing account between the plaintiff and defendant to ſave it out of the ſtatute of limitations. And for this debt, after the account ſtated, the plaintiff might have brought his action of debt, which would without doubt have been limited to ſix years by the ſtatute; and therefore it is unreaſonable that the plaintiff, by changing his action of *debt* to an action on the *caſe*, ſhould elude a ſtatute which was made for the public good. And he likewiſe ſaid, that actions of *account* on accounts between merchants are only excepted; but this is not an action of account, but a bare action on the caſe, which, as it appeared to him, was not excepted at all. And as to the other part of the declaration, he ſaid, that was more clear, becauſe it was only a bargain for wares ſold, and for money lent; and although it concerned merchandize and was between merchants, yet that was no reaſon why it ſhould be excepted out of the ſtatute; for if it ſhould be excepted, by the ſame reaſon every contract made between merchants would alſo be excepted, which was not the intention of the ſtatute; for in the ſtatute *accounts* between merchants only are excepted, and not *contracts* likewiſe. And as to the objection that may be raiſed that it is averred in the replication to be for merchandizes, he ſaid, that the replication does not ſhew

Debt lies on an account ſtated; and ſuch action is within the ſtatute of limitations.

Whether any other actions concerning accounts between merchants but actions of account are within the exception in the ſtatute. See poſt. note (7).

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Actions upon the caſe for money due on a contract between merchants for merchandizes ſold, are limited by the ſtatute and not within the exception in it.

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ſhew more than is contained in the declaration, namely, that the debt was for merchandize ſold. In like manner every artificer or ſhopkeeper ſells merchandize, and yet the contract is within the ſtatute; and ſo it is in the preſent caſe; wherefore he concluded that this caſe was within the limitation and not ſaved out of the ſtatute, and that the plaintiff ought to be barred.

Saunders for the plaintiff argued, that this caſe was excepted, and intended to be excepted, out of the ſtatute; for he ſaid that, becauſe merchants trade among themſelves at a great diſtance, and although they make a complete contract, yet it may be when they are at a great diſtance one from the other, as one here in *England*, and the other at *Conſtantinople*, therefore the ſtatute does not intend to limit ſuch contracts between merchants and their factors. And perhaps a contract between merchants may be made by their factors in parts beyond the ſea at ſo great a diſtance, that the merchant plaintiff cannot know it, or have any notice of it from his factor, till one or two years after, and therefore a merchant will be in a worſe ſituation than any other if ſuch contracts ſhould be limited. And as to the account, he ſaid that it appeared to him to be expreſsly within the exception of the ſtatute; for the words are, "all actions of account, and upon the caſe, other than ſuch accounts as concern the trade of merchandize between merchant and merchant, &c." ſhall be limited, &c. So the ſtatute does not only except actions of account concerning merchandize, but excepts the *accounts themſelves* concerning merchandizes, and therefore an action upon the caſe concerning ſuch account is excepted alſo. And this is the more clear, becauſe the exception of accounts comes immediately after actions upon the caſe, which ſhews that the ſtatute intends to except ſuch actions upon the caſe as concern accounts between merchants, as well as to except actions of accounts. For the preciſe words of exception do not except actions of account any more than actions upon the caſe, but only the accounts themſelves; and then by conſtruction of law any action, whether of account, or upon the caſe, concerning ſuch accounts between merchants is excepted, and not limited to ſix years. For if another conſtruc-

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tion ſhould be made no action at all will be excepted, and therefore, though the accounts themſelves are not limited, yet if the action for the recovery of the debt due upon them ſhall be limited, the exception will be vain and deluſive, which never was the intention of the maker of the act, wherefore he prayed judgment for the plaintiff. WEBBER v. TYRELL.

But the whole court was againſt the plaintiff for the reaſons given by *Jones* (6). And *Morton* juſtice ſaid that no action but

(6) The ſettled diſtinction ſeems now to be between an *open* or *current* account, and one that is *ſtated*; the former is holden to be within the exception of the ſtatute, but the latter is *barred* by it. Thus, where an account was made between F. and B. both merchants, and B. acknowledged 12col. to be due, but F. claimed more, and before the whole account was finiſhed, F. died; and his executor filed a bill in chancery againſt B., who pleaded in bar the ſtatute of limitations, and *Jones*, *Croke*, and *Barkley* juſtices, to whom it was referred, certified, that it was no bar, *becauſe the account was not ended*, and alſo becauſe it was between merchants. Sir *W. Jones*, 401. Sir *George Sandys* v. *Blodwell*. So where in *aſſumpſit* the doubt was, whether the declaration amounted to *an account ſtated*; for if it did, then from that time it was not within the exception in the ſtatute, which ſays, "other than ſuch accounts as concern "the trade of merchandize between "merchant and merchant;" for from the ſtating of the account that becomes a certain debt which was before an uncertain one. And therefore though an account be running 20 years or upwards between merchants, yet there is no danger from the ſtatute becauſe of the exception, which was made for a good reaſon. And this diverſity between accounts ſtated and unſtated, as it was ſaid, had been often agreed, and was not denied by the court. 1 Sid. 465. *Martin* v. *Delbo*. S. C. 1 Mod. 70. 1 Vent. 89. 1 Lev. 208. So where in an *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe, and a *quantum meruit* for wares ſold, and an *inſimul computaſſet*, &c. the defendant pleaded the ſtatute of limitations, "*non* "*aſſumpſit infra ſex annos*;" the plaintiff replied, that this action was grounded on the trade of merchants, and brought againſt the defendant as factor, &c.; the defendant rejoined, that it was not *an action of account*, to which the plaintiff demurred; and it was ſaid by the court that the ſaving in the ſtatute extends only to accounts between merchants, their factors and ſervants; and an action on the caſe will not lie againſt a bailiff or factor, where allowances and deductions are to be made, unleſs the account be adjuſted, and ſtated, as it was reſolved in Sir *Paul Neal*'s caſe againſt his bailiff. Where the *account* is once *ſtated*, the plaintiff muſt bring his action within ſix years, but if it be adjuſted, and a following account is added, in ſuch caſe the plaintiff ſhall not

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but an action of account was excepted by the ſtatute; but the other juſtices ſaid nothing thereto, but gave judgment for the defendant, that the plaintiff take nothing by his bill (7).

It was alſo touched by the court that admitting the plaintiff's replication had been good for the money on the account, and the action for that had not been limited by the ſtatute, yet when the defendant had pleaded the ſtatute to *both* promiſes in the decla-

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not be barred by the ſtatute, becauſe it is a *running* account. 2 Mod. 311, 312. *Farrington* v. *Lee.* 1 Mod. 268. S. C. It was alſo adjudged in 4 Mod. 105. *Chievly* v. *Bond*, that the ſtatute excepts only accounts which are current between merchants, and not any which are ſtated. It was alſo holden by *Jeffries* lord chancellor that the ſtatute of limitations is no plea in bar in an *open account.* 1 Vern. 456. *Scudamore* v. *White:* and in 2 Vern. 276 *Sherman* v. *Sherman*, it is ſaid, that only *open accounts* between merchants are ſaved by the ſtatute. And Lord *Hardwicke* in a caſe before him in chancery ſays, "that it is a pretty difficult conſtruction how to apply the exception in the ſtatute relating to merchants accounts. It is not, that the defendant may not plead the ſtatute in all caſes where the account is cloſed and concluded between the parties, and the dealing and tranſaction over. It was not the meaning to hinder that; but it was to prevent *dividing* the account between merchants where it was *a running* account, when perhaps *part* might have begun long *before* the time of the ſtatute, and the account never ſettled, and perhaps there might have been dealings and tranſactions *within* the time of the ſtatute." 2 Veſ. 400. *Welford* v. *Liddel.* So where the plaintiff, to a plea of the ſtatute, replied a bill of *Middleſex*, and that the defendant promiſed to pay within ſix years before the ſuing out of the writ, and it appeared, that all the items in the bill whereon the demand aroſe, except the laſt, were above ſix years ſtanding before the bill of *Middleſex* ſued out; it was inſiſted for the plaintiff that the laſt item being within ſix years, and this being a current account never liquidated, ſhould draw the former items out of the ſtatute; but it was held by Mr. Juſtice *Deniſon*, that the clauſe in the ſtatute of limitations about merchants accounts extended only to caſes where there were *mutual* accounts, and *reciprocal* demands between two perſons; but if there were only a demand by A. againſt B. in the common way of buſineſs, as by a tradeſman on his cuſtomer, that cannot be called merchants accounts; and he was clearly of opinion that in that caſe, the ſtatute was a bar to all demands of above ſix years ſtanding. Bull. *Niſ. Pri.* 149, 150. *Cotes* v. *Harris.* So in the caſe of *Crauch* v. *Kirkman*, before Lord *Kenyon*, Peake's *Niſi Prius*, 121. which was an action for goods ſold and delivered by the teſtator, to which the defendant pleaded the general iſſue, and gave a notice of ſet-off for goods ſold and delivered, &c. The defendant's ſet-off

declaration which was a good plea *primâ facie*, and the plaintiff made an *entire* replication to the plea, and the replication was bad as to the *indebitatus aſſumpſit*, though ſufficient as to the *inſimul computaſſet*, yet the replication being entire, and bad in part, is bad in the whole, and ought to

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ſet-off conſiſted of ſeveral items for goods ſold at different times from 1783 to 1788: the plaintiff's demand accrued chiefly in the year 1783, but there were two ſmall articles ſold in the year 1787. It was contended on the part of the plaintiff that the greateſt part of the ſet-off was within the ſtatute of limitations, no promiſe being proved within ſix years. But Lord *Kenyon* ſaid he thought this was within the exception in the ſtatute as to merchants accounts. He agreed that where the demand of one party ariſes long after the demand of the other, that ſhall not revive the antecedent account; but this was in the nature of a running and *mutual* account between the parties, and was preciſely the caſe put by Mr. J. *Deciſon* in *Cotes* v. *Harris*, which his lordſhip ſaid he particularly remembered, and of which he believed no one but himſelf had taken a note, the report of it which appeared in Buller's *Niſi Prius* having been furniſhed by him. It was then contended by the plaintiff's counſel, that the exception extended to no other deſcription of perſons but *merchants*; but Lord *Kenyon* over-ruled it. However this opinion ſeems once to have prevailed, as appears from Chan. Caſ. 152. *Sherman* v. *Withers*, where it was ſaid that the exception as to merchants accounts extends only to merchants trading beyond ſea, and not to inland merchants; So *Atkyns* J. thought that no other ſort of tradeſmen but merchants were within the benefit of this exception, and that it did not extend to ſhop-keepers, they not being within the ſame miſchief. 1 Mod. 270. *Farrington* v. *Lee*. Afterwards it was adjudged in *Catling* v. *Skoulding*. 6 Term Rep. 189. that if there be a mutual account of any ſort between the plaintiff and defendant, for any item of which credit has been given within ſix years, *that* is ſuch evidence, of an acknowledgment of there being ſuch an open account between the parties, and of a promiſe to pay the balance, as to take it out of the ſtatute. That caſe was, *aſſumpſit* for uſe and occupation,—the defendant pleaded the ſtatute, and a ſet-off for goods ſold and delivered.—Replication that the defendant did promiſe within ſix years. The plaintiff's teſtator was an attorney at H., the defendant was a dealer in ſpirituous liquors, and a tallow-chandler. There was due from the defendant to the teſtator at the time of his death, on the 20th of *October* 1788, for rent 200l. for nine years and a half, and 20l. for caſh on account. During the time theſe arrears of rent were becoming due, the defendant furniſh-

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to be adjudged wholly againſt the plaintiff who made it.—And this was a fault in the replication, as I conceive—*quod nota* (8).

ed the teſtator with various articles in the way of his trade. The balance due to the teſtator's eſtate at the time of his death was above 171l. *There never was any ſettlement of account between the teſtator and the defendant. The laſt half year's arrear of rent, and one or two of the laſt articles of the defendant's bill, were within ſix years before the plaintiff's writ was ſued out.* It was objected by the defendant that this caſe was not within the exception in the ſtatute; and if it were, it ſhould have been replied ſpecially, in order to have brought the caſe directly within the ſtatute, and in ſupport thereof this caſe of *Webber* v. *Tivill*, and the before mentioned caſe of *Farrington* v *Lee* were cited; and it was further contended, that the exception was confined to accounts current between the parties, and therefore did not extend to croſs demands of a diſtinct nature, as the demand in this caſe was; for otherwiſe every croſs demand might be converted into an account current to prevent the operation of the ſtatute; but it was adjudged by Lord *Kenyon* and the court, that where there is no *item* of account at all within ſix years before the action brought, the plaintiff will be precluded unleſs he can bring his caſe within the exception in the ſtatute concerning merchants accounts, and in ſuch caſe his replication muſt bring his caſe within the ſtatute. But it muſt be remembered that there the plaintiff is not barred, though there has been no tranſaction of any kind between the parties for ſix years; for by his replication he inſiſts that his caſe never was within the ſtatute, for that "the accounts were between "merchant and merchant," &c. But the caſe before the court ſteered wide of that objection; it was not doubted, but that a promiſe or acknowledgment within ſix years would take the caſe out of the ſtatute, and the only queſtion was whether there was not evidence of an acknowledgment. There were mutual *items* of accounts, and Lord *Kenyon* ſaid he took it to have been clearly ſettled, that every new *item* and credit in an account, given by one party to the other, was an admiſſion of their being ſome unſettled account between them, the amount of which was afterwards to be aſcertained: and any act, which the jury might conſider as an acknowledgment of its being an open account, was ſufficient to take the caſe out of the ſtatute. That daily experience taught us that if that rule were overturned, it would lead to infinite injuſtice. In *Cotes* v. *Harris* all the *items* were on one ſide; and *Deniſon* J. who well knew what was the proper replication in ſuch caſes, and was well acquainted with the import of the ſtatute of limitations, ſaid, where all the *items are on one ſide*, the laſt *item* which happens to be within ſix years ſhall not draw after it thoſe that are of longer ſtanding; but it was not doubted there,

there, but if there had been *mutual* demands, the plaintiff might have recovered.

(7) It appears by ſome of the caſes cited in the preceding note, that the law is now taken to be, that the exception in the ſtatute applies alſo to *actions on the caſe*; and the diſtinction is, that where there have been mutual, current, and unſettled, dealings and accounts between the parties, and any of the *items* are within ſix years, the plaintiff, to a plea of the ſtatute that the defendant *did not* promiſe within ſix years, may reply *generally*, that the defendant *did* ſo promiſe, and the reaſon ſeems to be, becauſe the mutual accounts between the parties, for any *item* of which credit has been given within ſix years, are of themſelves *evidence* of there being ſuch an open account, *and of a promiſe to pay the balance*: therefore that ſort of evidence is as proper on the iſſue of *non aſſumpſit infra ſex annos*, as any other evidence of an acknowledgment of the debt by the defendant, or of his promiſe to pay it, which is always admitted under that iſſue to take the caſe out of the ſtatute. But where there is *no item* of account at all within ſix years, the plaintiff to the plea of the ſtatute muſt reply *ſpecially* as is done in this caſe, (p. 123.) in order to bring his caſe within the exception in the ſtatute. However it ſeems formerly to have been holden according to the argument of *Jones*, and the opinion of *Morton* J. that no other action but of *account* was excepted by the ſtatute. And perhaps the ground of that opinion was, that as it was agreed on all hands that an unſettled account was within the exception in the ſtatute, and the true legal remedy, where the account is unſettled, being by an action *of account*, therefore the conſtruction of the ſtatute was, that only actions of account were within the exception. In the before cited caſe of *Farrington* v. *Lee*, 1 Mod. 270. which was determined about five years ſubſequent to the preſent, it was reſolved by *North* chief juſtice, *Wyndham* and *Scroggs* juſtices, that the exception in the ſtatute goes only to actions *of account*, and not to *other* actions. And they took a diverſity betwixt an account *current*, and an account *ſtated*. After the account ſtated, the certainty of the debt appears, and all the intricacy of account is out of doors. And by *North*, if after an account ſtated, upon the balance of it, a ſum appear due to either of the parties, which ſum is not paid, but is afterwards thrown into a new account between the ſame parties, it is now ſlipped out of the ſtatute again. And in the report of the ſame caſe, 2 Mod. 312, it is ſaid, that if an action of *aſſumpſit* for goods ſold, and on an *inſimul computaſſit* be not barred, then the exception would extend to all actions between merchants and their factors, as well as to actions of *account*, which was never intended. So in an action on the caſe on a bill of exchange brought againſt the drawer, the defendant pleaded that the cauſe of action did not accrue at any time within ſix years before the exhibiting of the bill; the plaintiff replied, that he and the defendant are and were merchants, and that the bill of exchange was upon an account between them concerning merchandiſes, and it was adjudged by *Holt* C J and the court, upon demurrer, that bills of exchange

change for value received are not ſuch matters of account as are intended by the exception in the ſtatute of limitations; and that by the exception in the ſtatute concerning merchants accounts, no *other* actions are excepted *but actions of account*. Carth. 226. *Chevely* v. *Bond*. 1 Show. 341. S.C. To an action of account the defendant may plead the ſtatute, and the plaintiff may reply that it was an account between merchants. See the form, Vid. Ent. 76. 3 Wilſ. 74. 79, 80. *Godfrey* v. *Saunders*. See ante. 61. 64. *Hodſden* v. *Harridge*, 120. *Chandler* v. *Vilett*.

(8) See 1 Saund. 28. *Mancheſter* v. *Vale*, and the authorities cited in note 2.

Caſe 23.

Coppin *verſus* Hurnard.

Hil. 21 & 22 Car. 2. Regis. Rot. 1251.

Some precedent. 2 Mont Ent. 219.

SUFFOLK, to wit. BE it remembered that heretofore, to wit, in the term of St. *Michael* laſt paſt, before our lord the king at *Weſtminſter* came *Thomas Coppin* by *Edward Nelſon* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *William Hurnard* gent. in cuſtody of the marſhal of a plea of debt, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit:

Debt on an award.

Suffolk, to wit, *Thomas Coppin* complains of *William Hurnard* gent. being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, of a plea that he render to him 9l. of lawful money of *England*, which he owes to, and unjuſtly detains from him, for this, to wit, that whereas on the 12th day of *September* in the 19th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. certain ſuits and controverſies were moved, had and depending, between the ſaid *Thomas* and *William*, (1) for the pacifying and determining of which ſaid ſuits and controverſies, the ſaid *Thomas* and *William*, on the ſaid 12th day of *September* in the 19th year aforeſaid, at *Haleſworth* in the county aforeſaid; ſubmitted (2) themſelves to ſtand to the award, order and judgment of one *William Cary* gent. and one *Edward Nelſon* gent, arbitrators indifferently choſen between them, ſo as the ſaid award ſhould be made by the ſaid arbitrators of and upon the premiſes before the laſt day of *Michaelmas* term then next following, if they could, and if they

(1) See ante 61. Hodſden v. Harridge, note (1).

(2) Ib. note (2)

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Plaintiff and defendant ſubmitted themſelves to the award of W.C. and E N. ſo as they made their award be-

they could not, then to the award and final determination of one *Richard Coke* eſq. an umpire indifferently choſen between the ſaid *Thomas* and *William Hurnard*, ſo as that award ſhould be made of and upon the premiſes before the ſaid laſt day of *Michaelmas* term. And the ſaid *Thomas* in fact ſays, that the ſaid *William Cary* and *Edward Nelſon* did not make any award, *nor could* they make any award, between the ſaid parties, of and upon the premiſes, before the ſaid laſt day of *Michaelmas* term; and the ſaid *Richard Coke* having notice thereof, and having taken upon himſelf the burthen of the ſaid award afterwards, and before the ſaid laſt day of *Michaelmas* term aforeſaid, to wit, on the 25th day of *November* in the aforeſaid 19th year of the reign of our ſaid lord the now king, at *Haleſworth* aforeſaid, awarded between the ſaid *Thomas* and *William Hurnard* of and upon the premiſes (3) in form following, that is to ſay, that the ſaid *William Hurnard*, on the 24th day of *December* then next following, ſhould pay to the ſaid *Thomas Coppin* 9l. as well for money due from the ſaid *William Hurnard* to the ſaid *Thomas*, as for the coſts and charges of the ſaid *Thomas* in and about the proſecuting and defending of the ſaid ſeveral ſuits, and that on payment of the ſaid 9l., the ſaid *Thomas* and *William* ſhould give to each other general acquittances; (4) whereby an action has accrued to the ſaid *Thomas* to demand and have from the ſaid *William Hurnard* the aforeſaid 9l. Yet the ſaid *William* (although often required) has not yet paid the ſaid 9l. to the ſaid *Thomas*, but to pay the ſame to him has hitherto altogether refuſed and ſtill refuſes, to the damage of the ſaid *Thomas* of 10l. and therefore he brings ſuit, &c. (5).

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fore the laſt da of Michaelmas term, and if th could not, the to the umpirag of R. C. ſo as he made his award before th ſaid laſt day of Michaelmas term.

The arbitrator did not, nor could make an award.

(3) Ante, 62. note (3).

(4) Ib. note (4)

(5) Ib. note (5)

And now at this day, to wit, on *Saturday* next after the octave of St. Hilary in this ſame term, until which day the ſaid *William Hurnard* had leave to imparl to the ſaid bill, and then to anſwer, &c. before our lord the king at *Weſtminſter*, comes as well the ſaid *Thomas Coppin* by his attorney aforeſaid, as the ſaid *William* by *William Cary* his attorney. And the ſaid *William Hurnard* defends the wrong and injury when, &c. and ſays that the ſaid *Thomas* ought not to have or maintain his ſaid action thereof againſt him, becauſe he ſays that the declaration aforeſaid, and the matter in the ſame contained,

Imparlance.

Demurrer.

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tained, are not ſufficient in law for the ſaid *Thomas* to have his aforeſaid action thereof maintained againſt him the ſaid *William Hurnard*, to which ſaid declaration he the ſaid *William Hurnard* has no neceſſity, nor is he bound by the law of the land in any wiſe to anſwer. And this he is ready to verify; wherefore for want of a ſufficient declaration in this behalf, he the ſaid *William Hurnard* prays judgment, and that the ſaid *Thomas* may be barred from having his ſaid action thereof againſt him the ſaid *William*, (6) &c.

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Joinder in Demurrer.

And the ſaid *Thomas* ſays, that he, by any thing by the ſaid *William Hurnard* above in pleading alleged, ought not to be barred from having his aforeſaid action thereof againſt the ſaid *William Hurnard*, becauſe he ſays, that the declaration aforeſaid, and the matter in the ſame contained, are good and ſufficient in law for him the ſaid *Thomas* to have his aforeſaid action thereof maintained againſt the ſaid *William Hurnard*, which ſaid declaration and the matter in the ſame contained, he the ſaid *Thomas* is ready to verify and prove, as the court, &c. and becauſe the ſaid *William Hurnard* does not anſwer the ſaid declaration, nor has hitherto in any wiſe denied the ſame, the ſaid *Thomas* prays judgment, and his debt aforeſaid, together, with his damages on occaſion of the detention of the ſaid debt, to be adjudged to him, &c. But becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day therefore is given to the parties aforeſaid, before our lord the king at *Weſtminſter*, until day next after to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king here is thereof not yet, &c.

(6) See 5 Mod. 131. *Leaves* v. *Bernard*, where it is holden, that if a plea is ever ſo informal, beginning and ending in *abatement*, and indeed partaking very little of the uſual form of a demurrer, but is nevertheleſs meant to be, and in ſubſtance is, a demurrer, it is good.

Coppin *verſus* Hurnard.

Caſ. 23.

Hil. 21 & 22 Car. 2. Regis. Rot. 1251.

DEBT upon an award by *Coppin* againſt *Hurnard*; the plaintiff declares, that whereas there were divers ſuits and controverſies depending between the plaintiff and defendant, for the determining of which, the plaintiff and defendant, on the 12th of *September* in the 19th year of the reign of the now king, ſubmitted themſelves to ſtand to the award of *William Cary*, and *Edward Nelſon*, arbitrators indifferently choſen between them, ſo as the ſaid award ſhould be made by the ſaid arbitrators of and upon the premiſes before the laſt day of *Michaelmas* term then next following, if they could, and if they could not, then to the award and final determination of one *Richard Cake* eſq. an umpire indifferently choſen between the parties, ſo as the ſaid umpirage ſhould be made of and upon the premiſes before the ſaid laſt day of *Michaelmas* term aforeſaid. And the plaintiff in fact ſays, that the arbitrators did not make, *nor could* they make, any award between the parties aforeſaid of and upon the premiſes before the ſaid laſt day of *Michaelmas* term, whereof the ſaid umpire, having notice, and having taken on himſelf the burden of the award, afterwards, and before the ſaid laſt day of *Michaelmas* term, to wit, on the 27th of *November* in the 19th year aforeſaid, made his umpirage on the premiſes between the parties, namely, that the ſaid defendant at *Chriſtmas* following ſhould pay to the plaintiff 9l. for money due to the plaintiff, and alſo for the coſts of ſeveral ſuits at law; and that on payment of that money both parties ſhould give general acquittances to each other. And the plaintiff avers non-payment of the money, *whereby an action has accrued, &c.* to which declaration the defendant demurred in law.

S. C. 1 Sid. 428. 455. Sir T. Raym. 187. 1 Lev 285. 1 Mod 15. 2 Keb. 562. 619.

If a ſubmiſſion be to arbitrators, and if they diſagree, then to an umpire, and the award and umpirage are limited to the *ſame day*, the power of the umpire is void, unleſs the arbitrators diſagreed, and declared they would not intermeddle any more; and the plaintiff, in ſuch caſe, muſt ſhew in his declaration *the cauſe why the arbitrators could not make their award.*

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And it was argued by *Jones* for the defendant, that the umpirage was void, becauſe the umpire has made his award within the time limited for the arbitrators to make their award. For the arbitrators have power to make their award at any time before the laſt day of *Michaelmas* term following; and the umpire has no power to make his award but

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only in caſe the arbitrators cannot make their award. But it does not appear here that the arbitrators could not make their award; for although it is averred in the declaration that the arbitrators *could not* make their award, yet this avails nothing, unleſs a ſpecial cauſe be ſhewn why they could not make their award. For ſuppoſe that, after the umpire has made his award, the arbitrators had alſo made their award, which of them is the defendant bound to perform? Certainly he is bound to perform the award of the arbitrators; wherefore it follows that the umpire has made his award ſooner than he ought, and therefore the umpirage is void in law. And he cited *Barber* and *Giles*'s caſe 1 Roll. Abr. 261. (*b*) where the ſubmiſſion was to arbitrators, and if they diſagreed then to the umpirage of J. S. ſo as the award, or umpirage, be made before the firſt day of *May*; in this caſe the umpire cannot make any award before the arbitrators have diſagreed; and the arbitraors have power to make their award at any time before that day, and ſo no time limited for the umpire, and therefore his power merely void, as it is ſaid in the book. And he alſo cited the caſe of *Bernard* v. *King* 1 Roll. Abr. 262. (*c*) where the ſubmiſſion was to arbitrators, ſo as they make their award *to-morrow*, and if they cannot then agree, then to the umpirage of T. S., ſo as he make his umpirage *to-morrow*, or *the next day*, in this caſe the umpire cannot make his umpirage on the morrow, although the arbitrators declare that they would not any more intermeddle with the award. But he ſaid that, perhaps the umpirage in this caſe might have been good, if the arbitrators had met before the day and diſagreed, and therefore had relinquiſhed their power to the umpire, and had ſo declared it, and all this matter had appeared in the declaration; but now no ſuch matter appears in the declaration; wherefore he concluded that the declaration was not good, and prayed judgment for the defendant.

(*b*) S. C. cited 2 Vent. 115.

(*c*) S. C. Sty. 306. S. C. cited 2 Mod. 275. If a ſubmiſſion be to arbitrators ſo as they make their award *to-morrow*, and if they cannot agree, then to an umpire, ſo as he makes his umpirage *to-morrow, or the next day*, in this caſe the umpire cannot make his umpirage on the morrow.

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Saunders for the plaintiff argued, that the umpirage was well made, and the queſtion is not ſo properly whether the umpirage be good, or not, as whether the ſubmiſſion of the parties be wholly void as to the umpire, or not; for by the ſubmiſſion, as well the umpirage, as the award, was limited

to

to be made before the laſt day of *Michaelmas* term, and therefore the umpirage ought of neceſsity to be made within the time limited to the arbitrators to make their award, becauſe the ſame time was limited for the one as for the other. And therefore to conſtrue the ſubmiſſion to be void, which is the proper act of the parties, is a very hard caſe, if by any reaſonable conſtruction it can be otherwiſe. And he ſaid, that here it may be well conſtrued in this manner, namely, the parties ſubmit to the award of the arbitrators to be made before the laſt day of the term, if they make any award; and if they do not make any, and the umpire ſhall make an umpirage within the ſame time, then the parties ſhall ſtand to ſuch umpirage. And this was the true ſenſe and intention of the parties, and is not void, but ſtands well with law. And he compared this ſubmiſſion to a caſe in *Dyer* 347. *a.* where the condition of an obligation was, that the obligor before ſuch a day ſhould make a leaſe to the obligee for the term of thirty-one years, if A. B. would aſſent to it, and if he would not aſſent, then for twenty-one years, there the obligor was bound to make the one leaſe or the other before the day, although A. B. might aſſent at any time before the day; and if he aſſented, the obligor was obliged to make a leaſe for thirty-one years, but if he did not, yet he was bound to make a leaſe for twenty-one years within the time. And as to the caſe of *Bernard* v. *King*, he ſaid, that there was not any reaſon to conſtrue the umpirage to be good, being made within the time which the arbitrators had to make their award, becauſe the umpire had a longer time limited to him to make his umpirage, after the time limited to make the award was determined, wherefore there was no neceſſity to make the umpirage within the time limited for the award. But otherwiſe it is in the caſe at bar, for here the award and umpirage were limited together within the ſame time, ſo that the umpirage ought to be made within the time limited for the award, or elſe it cannot be made at all. And as to the caſe of *Barber* v. *Giles*, he anſwered, that the caſe was that the arbitrators had time to diſagree until the laſt minute of the time limited for making the award or umpirage; but he [132] ſaid, that if the arbitrators will meet before the time is ſo elapſed,

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elapſed, and then diſagree and declare their diſagreement, the umpire may well afterwards, and within the time, make his umpirage, and it will be good as may be collected out of the ſame book. For the book ſays, that the umpire cannot make his umpirage until the diſagreement of the arbitrators, which implies that he may after their diſagreement within the time limited: but if the arbitrators defer their diſagreement to the laſt inſtant of time, then is the power of the umpire merely void, as the book ſays, namely, by this matter *ex poſt facto*; but the ſubmiſſion was good at firſt, and might have taken effect in the umpirage; and the ſaid book, he ſaid, does not imply the contrary. And here it is averred that the arbitrators did not make, *nor could* make any award, ſo that it was impoſſible for the arbitrators to make their award, as it is averred, wherefore the umpire might well make his umpirage; for perhaps one of the arbitrators was dead, and therefore the arbitrators did not make, nor could they make, an award, &c. And to prove the ſubmiſſion good the caſe of *Fyall* and *Varier* 1 Roll. Abr. 261. (*b*) is expreſs, for there was the ſame time for the arbitrators and for the umpire to make the award, or umpirage, and it was there ſaid that it was good, becauſe it was the expreſs agreement of the parties. And in this caſe the umpire having made an umpirage, and the arbitrators having made no award, he concluded that the umpirage was well made, and prayed judgment for the plaintiff.

(*b*) S. C. Godb. 241. pl. 314. The expreſs agreement of the parties will make an umpirage good, though the ſame time is limited for the arbitrators and for the umpire to make the award or umpirage.

And after adviſing for one or two terms, the court in this term gave judgment for the defendant. And the principal reaſon was, becauſe the averment in the declaration was not ſufficient; for the plaintiff has averred that the arbitrators *did not make, nor could make, any award;* and it is true, that at the time of the umpirage made, the arbitrators had not made any award, but they might, either then, or afterwards, have made their award, and conſequently the umpire has made his umpirage before it came to his turn. And the averment, that the arbitrators *could not*, is idle and of no ſignification; for nothing appears to the court to the contrary but that the arbitrators might have made their award, if they would. But

true

true it is, if the plaintiff had ſhewn that one of the arbitrators had been dead, then it would have appeared to the court that the arbitrators *could not* make their award, but it does not appear ſo now. So if the plaintiff had declared that the arbitrators had diſagreed about making the award, and they had declared that they would not intermeddle any more with the award, then by the court, except *Twyſden* juſtice, the umpire might well have made his umpirage: but *Twyſden* held that the ſubmiſſion as to the umpire was altogether void. The caſe, however, as it appears upon the record, was adjudged for the defendant by the whole court.

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Note; that the caſe of *Jennings* and *Vandeputt* in Cro. Car. 263. and in 1 Roll. Abr. 262, was agreed by the court, namely, that the arbitrators, within the time limited to make their award, may chooſe an umpire to make an umpirage after the time for making their award is determined. (7).

Arbitrators may within the time limited to make their award chooſe an umpire to make an umpirage after the time for their award is determined.

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(7) In the caſe of *Fyall* v. *Varier* 1 Roll Abr. 261. pl. 3. it is held, that, if there be a ſubmiſſion to arbitrators with this clauſe, "that if they do not "end it within ten days they ſhall "nominate another that ſhall end it "within ten days," and they do not agree within ten days, upon which they appoint another who makes an award within ten days, the umpirage is good, becauſe it is the appointment of the parties and their ſpecial agreement, and by making the umpire the authority of the arbitrator determines.

If arbitrators choſe an umpire before the time allowed for their award was expired, it was formerly holden, that ſuch nomination was *ipſo facto* void, though they abſolutely reſolved not to make any award themſelves. 1 Salk. 70. *Reynolds* v. *Gray*. S. C. 12 Mod 120. 1 Ld. Raym. 222. It was alſo the opinion formerly, that the power of the arbitrators was not determined by the election of an umpire within the time limited to themſelves, unleſs they abſolutely refuſed to make any award; and even in that caſe the umpirage made within the time was void: for though the arbitrators might chooſe an umpire at any time during the continuance of their power, yet the umpire could not act until the time for the arbitrators was expired; but the arbitrators might ſtill have made an award. 1 Lev. 302. *Donavan* v. *Meſcal*. S. C. Sir T. Raym. 205. 1 Mod. 274. But the law ſeems now to be otherwiſe. As where in debt on bond, with a condition to perform the award of A. and B. ſo as they made their award on or before *the 29th of June*, and if they made no award, then to perform the umpirage of him whom A. and B. ſhould elect, &c. upon *nul agard* pleaded, the plaintiff replied, that A. and

A. and B. on *the 29th of June* elected C. to be umpire, and that he had made his umpirage, &c. and aſſigned a breach &c. And upon demurrer exception was taken, that A. and B. had all the 29th of *June* to make their award; but it was over-ruled; for *per Holt* chief juſtice. if a ſubmiſſion be made to A. and B. ſo as they make their award *before midſummer*, and if they do not agree, then to ſuch umpire as they ſhall chooſe, ſo as he makes his umpirage *before midſummer*, and an umpirage is made accordingly, it is good, becauſe the arbitrators determined their power before by electing an umpire. And ſo it was reſolved in the caſe of *Travers*, v. *Twiſleton* 1 Lev. 174. 2 Keb. 15. But if an umpire be named in the ſubmiſſion, he cannot make his umpirage, before the time is expired which is given to the arbitrators to make their award. 1 Ld. Raym. 671. *Mitchell* v. *Harris*. S. C. 12 Mod 512. 1 Salk. 71, 72. So where the ſubmiſſion was "ſo as the award be made by the arbi- "trators on or before the 21ſt of *May*, "and if not made before that day, then "to ſtand to the award of an umpire "&c." the arbitrators made no award, but chooſe an umpire on the 20th of *May*, who awarded, that the defendant ſhould pay to the plaintiff 40l. before the 11th day of *June* following; it was objected that they had no power to chooſe an umpire on the 20th of *May*, becauſe the arbitrators themſelves had power till the end of 21ſt of *May* to make their award: but the objection was diſallowed, for the arbitrators not having made any award, the award of the umpire was good, and judgment for the plaintiff. 1 Lutw. 541 544. *Elliott* v. *Chevall*. So where in debt upon bond for the performance of the award of J. S. and J. N. ſo as they made it on or before the 1ſt day of *July*, and if not, then to the umpirage of J. D. ſo as he make it on or before the 2d day of *July*. The arbitrators made no award, but J. D. made his umpirage *on the firſt day of July*; and upon demurrer it was objected that it was made before the time allotted by the ſubmiſſion, becauſe the arbitrators had the whole day, namely, the firſt day of *July* to make their award, and this umpirage was made on the firſt day, and the caſe of *Barnard* v. *King* was cited; but it was adjudged that the umpirage was good, for the parties had expreſsly given to the umpire the firſt day for executing his authority; and the court did not think the reaſon of the reſolution of the caſe cited to be of any force, namely, that the court would be in confuſion to adjudge which ſhould be good in caſe the arbitrators and the umpire had made ſeveral awards; for the award of the arbitrators if they had made any would be adjudged good, but if they had not, then the umpirage ſhould bind, and there would be no confuſion upon concurrence of authority as to the time, for the umpire had not an abſolute, but only a conditional concurrence, namely, if the arbitrators make no award within the time, and they thought the caſe in Roll. Abr. was not good law. Sir T. Jones, 167, 168. *Case* v. *Dare*. S. C. 2 Show. 164. And in 2 Term Rep. 644. 645. *Roe* v. *Doe*, it was objected that the two arbitrators, who had the power of naming an umpire, had named one before they had entered into the examination of the ſubject

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at all; but the court ſaid that there was not any ground for the objection; for it rather ſeemed to be the faireſt way of chooſing an umpire. And they ſaid that it had been ſolemnly determined in that court about thirty years before, that arbitrators might elect an umpire the inſtant they began to take the matter into conſideration. See alſo 2 Barnard, K. B. 154. *Cowell* v. *Waller*. And it ſeems to be now ſettled, that arbitrators cannot proceed on a reference, after they have once named an umpire, for then their authority ceaſes, though the time for making the award is not expired. Rep. Prac. C B. 116. *Danes* v. *Monſey*. Vin. Arbitrament 97. pl. 18. S. C. Hence it ſeems to follow, that the umpire may make his umpirage before the time, which is allowed the arbitrators to make their award, is expired, notwithſtanding what is ſaid by Lord *Holt* in the before cited caſe of *Mitchell* v. *Harris* 1 Ld Raym. 671. It was alſo adjudged in C. B. by three judges againſt the opinion of *Pollexfen* C. J. that where a ſubmiſſion was to two arbitrators, and if they make no award, then to the umpirage of ſuch perſon as they ſhould chooſe, and they choſe one J. N. who refuſed, and then they choſe another, ſuch nomination was a good one, for their power was not ſo determined by the election of the firſt umpire, that upon his refuſal they could not appoint another; and the firſt nomination being void by his refuſal was the ſame thing as if they had never choſen an umpire at all. 3. Lev. 263. *Trippet* v. *Eyre* S. C. 5 Mod. 457. 2 Vent. 113. 1 Show. 76. But in a ſubſequent caſe it was ſaid by *Holt* C. J. that if arbitrators have authority to chooſe an umpire, and they chooſe one accordingly, they have executed their authority, and cannot make another election, though the umpire does not accept of the umpirage, but it is otherwiſe if they elect upon express condition that he does not accept it; for then he is no umpire unleſs he accepts it; but *Rokeſby* juſtice doubted whether an expreſs condition would make a difference, becauſe the words "if the party elected "will accept it," ſeem to be implied in the election. 1. Salk. 70. *Reynolds* v. *Gray*. S. C. 1. Ld. Raym. 222. 12 Mod. 120. But the better opinion ſeems to be that if the umpire elected refuſes, the arbitrators may elect another *toties quoties*. Com. Dig *Arbitrament* (F).

So where arbitrators, having choſen an umpire according to their power, afterwards joined with him in making his award, it was held notwithſtanding to be a good one, for in law it is the umpirage of the *umpire only*, who was at liberty to take what advice, or opinion, or aſſiſtance he pleaſed. 3 Burr. 1474. *Soulſby* v. *Hodgſon*. 1 Black. Rep. 463. S. C. And if the arbitrators hear all the evidence, and afterwards diſagree, and ſtate the evidence to the umpire, on which he makes his award *without re examining the witneſſes*, it is good, unleſs he is required to examine them before he makes his award. 4 Term Rep. 589. *Hall* v. *Lawrence*. So if an arbitrator makes his award without examining the witneſſes *on oath*, that is no objection to the validity of the award, unleſs it be made at the time of their examination. 1 Boſ. & Pull. 91. *Ridoat* v. *Pye*.

Term. Sanctæ Trin.

Anno Regni Regis, Car. II. 22.

Caſe 24.

Barber *verſus* Fox.

Same precedent. 1 Mod. Ent. 134.

YORKSHIRE, to wit. Be it remembered that heretofore, to wit, in *Eaſter* term laſt paſt, before our lord the king at *Weſtminſter* came *Stephen Barber* by *James Smith* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *Humphry Fox* in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Yorkſhire*, to wit, *Stephen Barber* complains of *Humphry Fox* being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf for this, to wit,

A. F. father of the defendant was bound to the plaintiff by bond in the penal ſum of 92l. 12s.

that whereas one *Anthony Fox*, father of the ſaid *Humphry*, late of *Thorpe* in the pariſh of *Hatherſeidge* in the county of *Derby* in his life time, to wit, on the 17th day of *February* in the year of our Lord 1654, by his certain writing obligatory, ſealed with the ſeal of the ſaid *Anthony*, bearing date the ſame day and year, acknowledged himſelf to be held and firmly bound to the ſaid *Stephen* in the ſum of 92l. 12s. of lawful money of *England*, (1) with a condition to the ſaid writing ſubſcribed, that if the ſaid *Anthony*, his heirs, executors, or adminiſtrators, or any of them, ſhould pay to the ſaid *Stephen*

with a condition that if the ſaid A. F. his heirs, executors, or adminiſtrators ſhould pay 51l.

(1) Here, it ſeems, ſhould have been added this allegation, "to be paid to the "ſaid *Stephen*, whenever after the ſaid "*Anthony* ſhould be thereto required, "for which payment well and truly to "be made *he the ſaid* Anthony *bound* "*himſelf and his heirs* by the ſaid writ-"ing obligatory."

the

the full and juſt ſum of 51l. 16s. of like money of *England*, at or upon the 18th day of *February*, which ſhould then be in the year of our Lord 1656, at or within the then manſion-houſe of the ſaid *Stephen Barber* ſituate in *Uxhill* in the ſaid county of *York*, without fraud, or further delay, then the ſaid writing obligatory ſhould be void, and of no effect, otherwiſe ſhould ſtand and remain in full force, and virtue; which ſaid 51l. 16s. the ſaid *Anthony* in his life time, or the ſaid *Humphry* after the death of the ſaid *Anthony*, (of which ſaid *Anthony* he the ſaid *Humphry* is ſon and heir) have not, nor hath either of them, paid to the ſaid *Stephen*, on the ſaid 18th day of *February* in the ſaid year of our Lord 1656, at the ſaid manſion-houſe of the ſaid *Stephen* according to the form and effect of the ſaid condition, whereby the ſaid writing obligatory became forfeited. And the ſaid *Stephen* afterwards, to wit, on the 1ſt day of *January* in the 21ſt year of the reign of our lord *Charles* the ſecond now king of *England*, &c. intended to ſue the ſaid *Humphry*, as ſon and heir of the ſaid Anthony his father, on the ſaid writing obligatory to him in form aforeſaid forfeited; of which ſaid intention the ſaid *Humphry* having notice, he the ſaid *Humphry*, on the day and year laſt aforeſaid at *Rotheram* in the county aforeſaid, in conſideration that the ſaid *Stephen*, at the ſpecial inſtance and requeſt of the ſaid *Humphry*, would then forbear his ſuit ſo intended to be proſecuted by him the ſaid *Stephen* on the ſaid writing obligatory againſt the ſaid *Humphry* as ſon and heir of the ſaid *Anthony*, undertook, and then and there faithfully promiſed the ſaid *Stephen*, that he the ſaid *Humphry* would well and faithfully pay and content the ſaid *Stephen* the ſaid 51l. 16s. when he ſhould be thereto afterward required. And the ſaid *Stephen* in fact ſays, that he, giving credit to the aforeſaid promiſe and undertaking of the ſaid *Humphry*, did then and there at the ſaid inſtance and requeſt of the ſaid *Humphry* forbear his ſuit in form aforeſaid intended to be proſecuted by him the ſaid *Stephen* on the ſaid writing obligatory for the ſaid 92l. 12s. againſt the ſaid *Humphry* as ſon and heir of the ſaid *Anthony* his father, yet the ſaid *Humphry* not regarding his aforeſaid promiſe and undertaking, but contriving and fraudulently intending craftily and ſubtilely to deceive and defraud the

16s. the bond ſhould be void,

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but which was not paid either by A. H. in his life time, or by the defendant his heir after his death

whereby the bond was forfeited,

and defendant, having notice of plaintiff's intention to ſue him on the bond as heir, in conſideration plaintiff would forbear his intended ſuit, undertook to pay the money.

Averment that plaintiff did forbear his intended ſuit.

Breach.

BARBER v. FOX.

the ſaid *Stephen* in this behalf, has not paid the ſaid 51l. 16s. to the ſaid *Stephen* according to the ſaid promiſe and undertaking, nor has he in anywiſe hitherto contented him for the ſame, (although to do this, the ſaid *Humphry* afterwards, to wit, on the 10th day of *February* in the 22d year of the reign of our ſaid lord the now king, at *Rotheram* aforeſaid in the county aforeſaid, was requeſted by the ſaid *Stephen*,) but to pay the ſame to him, or in anywiſe to content him for the ſame has altogether refuſed, and yet refuſes, to the damage of the ſaid *Stephen* of 100l. And therefore he brings ſuit, &c.

The defendant pleads *non aſſumpſit*, and verdict and judgment for the plaintiff.

Caſe 24.

Barber *verſus* Fox.

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S. C. 1 Vent. 119. 2 Keb. 811. 836.

An aſſumpſit is not maintainable againſt an heir on a promiſe to pay money due upon the bond of his anceſtor, unleſs the heir was expreſsly bound in the bond.

ASSUMPSIT, that whereas one *Anthony Fox*, the father of the defendant, by his writing obligatory became bound to the plaintiff in 92l. 12s. upon condition to pay him 51l. 16s. at a certain day paſt, which was not paid, and ſo the obligation became forfeited, and afterward *Anthony Fox* the father died, and the defendant was his ſon and heir, wherefore the plaintiff intended to ſue the defendant as ſon and heir on the ſaid bond; and the defendant, having notice of it, in conſideration that the plaintiff, at the ſpecial inſtance and requeſt of the defendant, would forbear his intended ſuit againſt the defendant as ſon and heir on the ſaid bond, undertook and promiſed the plaintiff to pay him the ſaid 51l. 16s. on requeſt; and the plaintiff averred forbearance, and yet the defendant had not paid the ſaid money, although on ſuch a day and year he was requeſted, &c. to the damage of the plaintiff, &c. On *non aſſumpſit* pleaded a verdict was found for the plaintiff.

And now *Weſton* moved in arreſt of judgment, that here was no conſideration; for it does not appear that the defendant was ſueable upon this bond as ſon and heir, for it is not

ſhewn

ſhewn that *Anthony Fox*, the defendant's anceſtor, whoſe ſon and heir he is, *had bound himſelf and his heirs* by the ſaid bond; and if the heir is not bound expreſsly by name, he is not bound at all, and therefore here was no conſideration to found this promiſe; wherefore judgment was ſtaid until it ſhould be moved on the other ſide.

And afterwards *Saunders* for the plaintiff moved for judgment, and ſaid, that though the declaration would have been bad on demurrer, yet it is now made good by the verdict; for the jury have found that the defendant was bound as heir in the ſaid bond, for otherwiſe there was no conſideration; and they ought to have found that the defendant did not undertake, &c. if there was no conſideration, or otherwiſe they may be attainted for a falſe verdict; but they having found that the defendant did undertake and promiſe as the plaintiff has declared, it ought of neceſſity now to be intended that *Anthony Fox* had bound himſelf *and his heirs* by the ſaid bond.

Sed non allocatur; for by the court, though they would intend a perſonal lien againſt an executor, if he has aſſets in his hands, though it be not averred, yet they will not intend a real lien againſt an heir, though he be bound by the bond of his anceſtor, unleſs it is expreſsly alleged; and therefore they would not intend it here, though it be after verdict; wherefore judgment was arreſted; *quod nota* (2).

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(2) But where a father, being indebted to J. S. in 100l. by bond, made a *fraudulent* deed, and thereby gave all his goods to his ſon, and died, and upon a converſation had concerning the fraudulent deed, the ſon promiſed J. S. in conſideration he would deliver the bond to him, and make an acquittance and diſcharge to him of the debt, to pay him the 100l.; and an action having been brought thereon, and a verdict for the plaintiff, it was moved in arreſt of judgment, that the conſideration was not good, becauſe it did not appear that the ſon was liable to the payment of the debt, either as heir, or executor or adminiſtrator, or executor of his own wrong; and therefore delivering the bond, and making the acquittance or diſcharge to him, was not good. But it was anſwered and reſolved, that the conſideration was good; and it ſhould be intended that he was liable, or at leaſt that the diſcharge was made to the party who was liable, for the plaintiff promiſed to diſcharge the debt, and that ſhould be intended to be made to the party who was liable to the payment of it.

it, or elſe it would be no diſcharge. 1 Sid. 31. pl. (9.) If that was in truth a fraudulent deed of gift of the goods by the father to the ſon, as ſtated in the caſe, the ſon, after his father's death, would be chargeable for this debt as an *executor of his own wrong*, though poſſeſſion of the goods had been delivered to him at the time of the deed. For it is holden, that if a man makes a fraudulent gift of his goods in his life time to ouſt his creditors of their debts, the vendee after his death ſhall be charged for them. 1 Roll. Abr. 549. (C.) pl. 3. And the only way in which he can be ſo charged is, as executor of his own wrong. 2 Leon. 223. *Stamford*'s caſe. Cro. Jac. 271. *Hawes* v. *Leader*. Yelv. 197. S C., where it is ſaid, that the goods are liable to the creditors in the hands of the vendee, as an executor of his own wrong, if the deed of gift be fraudulent. And the reaſon is, becauſe every intermeddling without authority after the death of the party makes the perſon ſo intermeddling an executor of his own wrong. Dyer, 166. b. *Stoke*'s caſe. And the ſame point was recogniſed in the caſe of *Edwards* v. *Harben*, 2 Term Rep. 587, where it is adjudged that, if a creditor takes an abſolute bill of ſale of the goods of his debtor which is fraudulent againſt creditors, and the debtor dies, and thereupon the vendee takes and ſells the goods, he is liable to be ſued as executor of his own wrong for the debts of the deceaſed. Heence it ſeems to follow that the ſon was in the caſe in 1 Sid. liable to the payment of the debt, at leaſt to the extent of the value of the goods, as executor of his own wrong, and therefore the delivering of the bond to him, and giving him an acquittance, appears to be a ſufficient conſideration to ſupport his promiſe. For which reaſon that caſe ſeems to differ materially from the principal one. So where in *aſſumpſit* the plaintiff declared. that the defendant's father bound himſelf to the plaintiff in the ſum of 400l. for the payment of 200l. and that the father was dead, and the defendant was his ſon and heir, to whom the plaintiff intimated that he intended to ſue him as heir for the debt, and thereupon the defendant in conſideration of forbearance promſed to pay &c., and upon *non aſſumpſit* pleaded, and a verdict for the plaintiff, it was moved by *Twyſden ſerjeant* in arreſt of judgment, becauſe it was not ſaid that the father bound himſelf *and his heirs*, and therefore it did not appear that the defendant was liable to an action, and ſo the conſideration void. But it was adjuged that it ſhould be intended, it being found by the jury, according to Hob 216. *Bidwell* v. *Catton*, and the plaintiff had judgment, (but otherwiſe between *Barber* and *Fox*, Trin. 22 Car. 2. K. B.) *St. Paul* v. *Earl of Rivers*. Trin. 1656. K.B. cited in Sir T. Raym. 123. But this caſe being afterwards cited in *Hunt* v. *Swain*, 1 Lev. 165. S. C. Sir T. Raym. 127. 1 Sid. 248. the court paid no regard to it, and *Twyſden* J. ſaid, he was counſel in it, and it was at the time taken to be a hard caſe. The caſe of *Hunt* v. *Swain* was *aſſumpſit* againſt the heir on a promiſe, in conſideration the plaintiff would forbear him until *Michaelmas*, to pay. After verdict for the plaintiff, judgment was ſtaid, becauſe it did not appear that the anceſtor bound himſelf *and his heirs*, and the conſideration was not to forbear generally,

generally, but to forbear him, who did not appear to be chargeable; but it was agreed that if the declaration had been that J. S. was indebted to him and died, and the defendant being *his executor* in conſideration of forbearance, promiſed, &c. as before, it would have been good, becauſe an executor is liable without expreſs words; whereupon the plaintiff, perceiving the judgment of all the court againſt him, prayed *nil capiat per billam*, with an intent to commence a new action.

So where the plaintiff declared that A. ſince deceaſed, was indebted to him in a certain ſum, and after his death in conſideration of the premiſes, and that he at the defendant's inſtance, would forbear and give day of payment of the debt, (not ſtating to whom he was to forbear) the defendant promiſed, &c.: it was holden on demurrer to be no conſideration for the promiſe; for a promiſe can only be ſuſtained on conſideration of benefit to the defendant, or of detriment to the plaintiff; and unleſs there was ſome perſon, whom the plaintiff could have ſued for his debt, his forbearance was no detriment to him. 4 Eaſt, 455. *Jones* v *Aſhburnham*.

It is a principle of law that an executor does more actually repreſent the perſon of his teſtator, than the heir does the perſon of his anceſtor: for if a man binds himſelf, his *executors* are bound, though they are not named; but it is not ſo of the *heir*. Co. Litt. 209. a. And as it is not ſtated in the principal caſe, that the anceſtor of the defendant bound himſelf *and his heirs*, without which there is no cauſe of action againſt the defendant, the declaration is defective in omitting ſo material an allegation, and therefore the verdict does not cure it. For though a verdict will cure a title which is imperfectly or defectively ſtated, yet, if the declaration ſtates either a defective title, or totally omits to ſtate any title or cauſe of action at all, a verdict will not cure ſuch a defect. See 1 Saund. 228. *c*. *Stennel* v. *Hogg*. It ſeems therefore that the deciſion of the court in this caſe is well founded. Indeed it has been ſaid, that if a man binds himſelf *and his heirs* in a bond and dies, and after the obligee ſues the heir, who has no aſſets deſcended to him, and the heir in conſideration that the plaintiff will not ſue him, promiſes to pay the money, this is no conſideration to maintain an *aſſumpſit*; becauſe the defendant was not chargeable without aſſets. 1 Roll. Abr. 28. pl. 57. Lord *Gray*'s caſe; but it ſhould ſeem that this would not now be ſo conſidered; for in the principal caſe it appears that the verdict was founded upon the want of alleging in the declaration that the anceſtor had bound himſelf *and his heirs*; and if the heir had been liable, it ſeems to follow that *forbearance* would have been adjudged a ſufficient conſideration to ſupport the promiſe without regarding whether he had aſſets or not at the time. And in Lord *Gray*'s caſe, if the defendant had not any aſſets he ought to have pleaded it to the action upon the bond: but if, inſtead of ſo doing, he deſires the obligee to forbear his ſuit, and in conſideration thereof promiſes payment, *that* appears to be a ſufficient conſideration: for though the forbearance may be of no *benefit* to the defendant, it might have been attended with *a loſs* to the plaintiff not to proceed in his ſuit. So the promiſe of an heir, in con-

ſideration of forbearance of a ſuit in chancery to which he was not liable, will not ſupport an *aſſumpſit*; as where in *aſſumpſit* the declaration ſtated, that there were controverſies between him and the defendant for the profits of certain lands which the defendant's father had taken in his life time; and that he had purchaſed a writ out of chancery againſt the defendant to the intent to exhibit a bill againſt him. Upon the return of the writ for the ſaid profits, the defendant, in conſideration he ſhould forceaſe his ſuit, promiſed that if he could prove that his father had taken the profits, or had poſſeſſion of the land under the title of the plaintiff's father, he would pay for the profits of the land, and averred that he had ſo proved it; and upon *non aſſumpſit* it was found for the plaintiff. But judgment for the defendant; for by the court it is no conſideration; for if the father of the defendant did take the profits, that is no reaſon why his ſon ſhould anſwer for them; and therefore the ſuit is unjuſt, and the ſtaying of it no good conſideration; but if the ſuit had been for evidences, or otherwiſe, the ſtaying of it had been a good conſideration; and beſides the plaintiff did not allege that he was heir or executor, and ſo had no colour to charge him; and if it had been ſo alleged, yet it was no cauſe to charge him for a perſonal tort. Cro. Eliz. 206. *Tooley* v. *Windham*.

But with reſpect to *executors*, if a creditor forbears at their requeſt to ſue them, that is conſidered as a ſufficient conſideration to charge them *de bonis propriis*, whether they had aſſets or not at the time of the promiſe, and therefore it is not neceſſary to aver in the declaration that they had aſſets. As if A. to whom the teſtator was indebted comes to the executor, and ſays that he intends to ſue him for the debt, whereupon the executor promiſes, in conſideration that the plaintiff will forbear him for a reaſonable time, to pay him, and A. accordingly forbears to ſue him for a reaſonable time, that is a good conſideration to charge the defendant, in an action upon the caſe, out of his own eſtate, without aſſets; for by this promiſe it is intended as well to forbear to ſue the executor as to forbear the debt; and a forbearance of a ſuit is a good conſideration without aſſets at the time of the promiſe. 1 Roll. Abr. 24. pl. 33. upon a demurrer, where the defendant pleaded that he had no aſſets when the promiſe was made. So if a man declares upon a promiſe againſt an adminiſtrator that the inteſtate was indebted to him in 10l. by bond, and died, and the defendant, being his adminiſtrator, in conſideration of the premiſes, and that the plaintiff *would ſpare him* till ſuch a time after, promiſed to pay him the debt, and avers that he ſpared him till the time, and the defendant had not paid him, &c though he did not ſay that he would ſpare him *the debt*, or to *ſue him*, yet it ſhall be ſo intended, and therefore the conſideration is good. 1 Roll. Abr. 15. pl. 3. So it was ſaid by *Hale* C. J. that though a bare accounting by the executor with a creditor of his teſtator will not bind the executor to pay *de bonis propriis*, yet a promiſe in conſideration of forbearance will. 2 Lev. 122. *Hawes* v. *Smith*. Alſo where the plaintiff having a debt owing to him from the teſtator on a ſimple

contract,

contract, the executor in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise; but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have lain against him, because without consideration, for the *heir* is not chargeable to any debt without specialty. Yelv. 55, 56. *Fish* v. *Richardson*, Cro. Jac. 47. S. C. So where in *assumsit* the plaintiff declared, that J S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgment, and no assets *ultra*, upon which the plaintiff demurred, and had judgment without argument: for it is not material whether he had assets or not, for he is charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy is a sufficient consideration. 2 Lev. 3. *Davis* v. *Reymer*. S. C. 1 Vent. 120. 2 Keb. 758. in which last book it is said, that if it had appeared by the declaration that the plaintiff had no cause of action the forbearance would not be sufficient. See 5 Term Rep. 690. *Deeks* v. *Strutt*. that no action at law lies for a legacy; but in this case the forbearance might have been to sue in Chancery, or in the ecclesiastical court, for the legacy, and then the considera tion may perhaps be a good one. So if A. together with B is bound to C. for the proper debt of B, and A. pays the money, and B. dies and make D. his executor, and D. in consideration that A. will forbear to sue him until such a time, promises to pay him, this is a sufficient consideration to support the promise. 1 Sid 89. *Scott* v. *Stevens*. So if an executor be indebted to J. S. in 100l. who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day*, it becomes *his own debt*, and to be satisfied out of *his own estate*. Yelv. 11. *Goring* v. *Goring*. See Cro. Eliz. 91. *Trevenian* v. *Howell*. 1 Vez. 126. *Reech* v *Kennegal*. However though the executor should promise upon a sufficient consideration to pay, yet his promise is not binding upon him by the statute of frauds 29 Car. 2. c. 3. s. 4. unless it be in writing. See 1 Saund. 210, 211. *Forth* v. *Stanton*, *notes* 1, 2. But a bare promise to pay by the executor, does not make him liable to answer out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made. And as we have already seen, (1 Saund. 211. *note* 2.) it makes no difference, though the executor had made such promise *in writing*. This point was fully established in *Rann* v. *Hughes*, both in the *exchequer chamber* and *house of lords*. 7 Term Rep. 350. *note* (a). 7 Brown P. C. 556. S. C.

Upon the principle that there was no cause of action against the defendant at the time of the promise, and therefore forbearance no consideration, *Pratt* C. J. held that an action would not lie against a married woman, who gave a promissory note as a feme sole, and after her husband's death in considera-

tion of forbearance, promiſed to pay it; and though it was inſiſted, that the defendant being under coverture at the time of giving the note, it was voidable for that reaſon, but by her ſubſequent promiſe, when ſhe was of ability to make a promiſe, ſhe had made herſelf liable, and the forbearance was a new conſideration: yet the C. J. held the contrary, and that the note was not barely voidable, but abſolutely void; and forbearance, where originally there was no cauſe of action, is no conſideration to raiſe an *aſſumpſit*. But he ſaid it might be otherwiſe where the contract was but voidable; and ſo the plaintiff was called 1 Str. 94. *Loyd* v. *Lee*. So a promiſe to revive a ſecurity which is void in its creation, is void, though if it were only voidable, the ſubſequent promiſe may revive it. As where all the creditors of an inſolvent conſented to accept a compoſition for their demands upon an aſſignment of his effects by a deed of truſt, to which they were all parties, and one of them, before he executed, obtained from the inſolvent a promiſſory note for the reſidue of his demand by refuſing to execute until ſuch note was made; it was adjudged that the note was *void* in law, as a fraud on the reſt of the creditors; and a ſubſequent promiſe to pay it was a promiſe without conſideration, which would not maintain an action. 2 Term Rep 763. *Cockſhott* v. *Bennett*.

Caſe 25.

Turner *verſus* Davies.

Paſch. 22 Car. II. Regis. Rot. 576.

Auditâ querelâ. Co. Ent. 89. a. A ſimilar precedent.

ENGLAND, to wit. OUR lord the king has ſent to his juſtices aſſigned to hold pleas before the king himſelf, his writ cloſe in theſe words, to wit: *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to our juſtices aſſigned to hold pleas before us greeting: By the *great complaint* of *Edward Turner* it is grievouſly complained of, and ſhewn to us, that whereas one *Edmund Spicer* heretofore, to wit, on the 1ſt day of *July* in the 20th year of our reign, at *London*, died inteſtate, after whoſe death, to wit, on the 21ſt pay of *July* in the 20th year of our reign aforeſaid, at *London* aforeſaid, adminiſtration of all the goods and chattels which were of the ſaid *Edmund Spicer* at the time of his death was committed by *Thomas Exton* doctor of law, ſurrogate lawfully appointed

E. S. died inteſtate.

Adminiſtration granted to the defendant.

of

of the venerable *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colcheſter*, to one *Alexander Davies* as the principal creditor of the ſaid *Edmund*, and that by virtue of the ſaid adminiſtration to the ſaid *Alexander Davies* ſo as aforeſaid committed, *the ſaid Alexander Davies, as adminiſtrator of the goods and chattels of the ſaid Edmund Spicer, afterwards, that is to ſay, in the term of St. Michael in the ſaid 20th year of our reign, came into our court before us at Weſtminſter in the county of Middleſex by Richard Somer then his attorney, and brought then there into the ſaid court his certain bill againſt the ſaid Edward Turner in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there were pledges of proſecution, to wit, John Doe and Richard Roe, by which ſaid bill the ſaid Alexander Davies as adminiſtrator of all and ſingular the goods and chattels aforeſaid, by the name of Alexander Davies adminiſtrator of all and ſingular the goods and chattels, rights and credits which were of the ſaid Edmund Spicer, complained of the ſaid Edward Turner then being in the cuſtody of the marſhal of our marſhalſea before us for this, to wit,* (1) that whereas the ſaid *Edmund*, in his life-time, that is to ſay, on the 1ſt day of *July* in the 20th year of our reign, at the pariſh of *Barking* in the county of *Eſſex*, was poſſeſſed of 48l. in monies numbered as of his own proper monies, and being ſo thereof poſſeſſed the ſaid *Edmund* afterwards, to wit, on the ſaid day and year in the ſaid bill mentioned, at *Barking* aforeſaid, in the county aforeſaid, died ſo poſſeſſed of the ſaid monies; after whoſe death the ſaid monies afterwards came into the proper hands and poſſeſſion of the ſaid *Edward* by finding, and that afterwards, to wit, on the 21ſt day of *July* in the 20th year aforeſaid, adminiſtration of all and ſingular

who brought an action of trover againſt the plaintiff in K. B.

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(1) The preſent method of declaring is much ſhorter than that which is above in italicks; after ſtating the granting of the adminiſtration as above, the declaration would now be in this form: "And whereas alſo the ſaid "*Alexander* afterwards, as ſuch adminiſtrator as aforeſaid, in our court before us at *Weſtminſter* in the county "of *Middleſex*, that is to ſay, in the "term of *St. Michael* in the 20th year "of our reign, by bill, without our "writ, impleaded the ſaid *Edward* "*Turner* in a plea of treſpaſs on the "caſe for that whereas," &c. Co. Ent. 87. b.

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the goods and chattels, rights and credits which were of the ſaid *Edmund Spicer*, at *Barking* aforeſaid in the county aforeſaid, was in due manner committed by *Thomas Exton* doctor of law, ſurrogate lawfully appointed of the ſaid *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colcheſter*, to the ſaid *Alexander*, the principal creditor of the ſaid *Edmund*, and that the ſaid *Edward*, although he well knew that the ſaid monies were the proper monies of the ſaid *Edmund* in his life-time, and did of right belong and appertain to the ſaid *Alexander* after the death of the ſaid *Edmund* by reaſon of the adminiſtration aforeſaid, yet contriving and fraudulently intending craftily and ſubtilely to deceive and defraud the ſaid *Alexander* of the monies aforeſaid in that behalf (2), had not then delivered to the ſaid *Alexander* the monies aforeſaid, (although the ſaid *Edward* afterwards, to wit, on the 1ſt day of *September* in the 20th year aforeſaid at *Barking* aforeſaid in the county aforeſaid, was requeſted by the ſaid *Alexander*) but the ſaid *Edward* afterwards, to wit, on the ſaid 1ſt day of *September* in the 20th year aforeſaid at *Barking* aforeſaid in the ſaid county of *Eſſex*, had converted and diſpoſed thereof to his own uſe and benefit, to the damage of the ſaid *Alexander* of 50l. and thereupon he then brought ſuit, &c. And the ſaid *Alexander* brought then there into our ſaid court before us the letters of adminiſtration aforeſaid, which teſtified the committing of the adminiſtration aforeſaid in form aforeſaid, the date whereof was the ſame day and year aforeſaid. And it is further ſhewn to us in our court before us on the behalf of the ſaid *Edward Turner*, that ſuch proceedings were had in our ſaid court upon the ſaid bill ſo as aforeſaid exhibited in our ſaid court before us againſt the ſaid *Edward Turner*, that afterwards, to wit, in the term of *Eaſter* in the 21ſt year of our reign, it was con-

(2) The uſual way now is, in a declaration in trover, to ſtate the granting of the letters of adminiſtration in this place within a parentheſis thus, ("to "which ſaid *Alexander* adminiſtration of "the good and chattels, rights and "credits, which were of the ſaid *Ed-*"*mund*, &c.") and not to ſtate it *before* the breach, as is done here.

ſidered

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And recovered judgment for 5 l.

ſidered by our ſaid court before us, the ſaid court then being at *Weſtminſter* aforeſaid, that the ſaid *Alexander* ſhould recover againſt the ſaid *Edward Turner* 5 l. for his damages which he had ſuſtained as well on occaſion of the premiſes, as for his coſts and charges by him about his ſuit in that behalf expended, as by the record thereof remaining in our ſaid court before us at *Weſtminſter* aforeſaid more fully appears. And it is further ſhewn to us on the behalf of the ſaid *Edward Turner*, that afterwards, that is to ſay, on the 21ſt day of *June* in the year of our Lord 1669, at *Weſtminſter* aforeſaid, before Sir *John Kelynge* knt. our chief-juſtice aſſigned to hold pleas before us, Sir *William Wylde* knt. and bart. one of our juſtices of the bench, *Leoline Jenkins* doctor of law, judge or lieutenant of the high court of admiralty of *England*, Sir *Juſtinian Lewin*, and Sir *Walter Littleton*, knts. and doctors of laws, *John Mills*, *Edward Alderne*, *Timothy Baldwyn*, and *Richard Lloyd*, doctors of law, judges rightly and [139] lawfully delegated and appointed by our commiſſion under our great ſeal of *England*, the merits and circumſtances of certain principal cauſes of revocation of a grant of letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer*, being heard, ſeen and underſtood, and fully and maturely diſcuſſed by virtue of an appeal in that behalf devolved, which was agitated and depending undecided before them in judgment, by virtue of a commiſſion of appeal under our great ſeal of *England*, between the ſaid *Alexander Davies* party appellant and complainant of the one part, and one *John Spicer*, natural and lawful brother on the ſide of the father of the ſaid deceaſed, party appellant and complainant of the other part, the ſaid judges delegates rightfully and lawfully proceeding, the parties aforeſaid lawfully appearing by their proctors before the ſaid judges delegates in judgment; the party of the ſaid *John Spicer*, that ſentence ſhould be given and juſtice done for his party, but the party of the ſaid *Alexander Davies* ſentence alſo for his party preſent, reſpectively demanding and praying; the ſaid judges delegates, having the whole and entire proceſs in ſuch caſe before them, proceeded to the definitive ſentence of them the ſaid judges delegates in manner and form following, that is

to

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to ſay, that becauſe to the ſaid judges delegates, inaſmuch as from the things done, enacted, deducted, propoſed, alleged, and proved in ſuch caſe, it appeared clearly found on the part of the ſaid *John Spicer*, that his intention in a certain allegation made among the acts of the judge from whom in that behalf it was appealed in the firſt inſtance of the cauſe, and in the proceedings of the ſaid judge, to the ſaid judges delegates as aforeſaid in that behalf tranſmitted, mentioned, and in the ſame cauſe exhibited, was ſufficiently and fully founded and proved, and that nothing effectual to the contrary on the part of the ſaid *Alexander Davies* in that behalf was deduced, excepted, propoſed, alleged or proved, which ſhould elude or in any manner weaken, the intention of the ſaid *John Spicer* in that behalf; therefore the judges delegates as aforeſaid, having firſt called on the name of Chriſt, and putting and having God alone before their eyes, by and with the advice of the learned in the law, with whom in this behalf they communicated, and maturely deliberated, did pronounce, decree and declare, that the ſaid *John Spicer* was and is, in the common reputation of men, the natural and lawful brother of the ſaid *Edmund Spicer* deceaſed, of whoſe right and credits it was in that cauſe debated, and for the intereſt of the ſaid *John Spicer*, and pronounced and declared that it was rightfully and lawfully proceeded in, pronounced, decreed and revoked by *Lewis Griffin* clerk, ſurrogate of the venerable *Thomas Exton* aforeſaid doctor of law official in and throughout the whole archdeaconry of *Colcheſter*, judge in the firſt inſtance of the cauſe, and alſo pronounced and declared that the letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer* deceaſed, theretofore granted to the ſaid *Alexander Davies* by the judge, from whom there was an appeal in this behalf in the firſt inſtance of the ſaid cauſe, were in fact badly and unjuſtly, and againſt the order of law, granted to the ſaid *Alexander Davies*, and pronounced, decreed and declared that letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed ſhould, and of right ought under proper ſecurity, to be committed to the ſaid *John Spicer*, and accordingly they committed the ſame to the ſaid *John Spicer*, ſworn in due form of law, and ratified

[140] Adminiſtration to the defendant was afterwards repealed, and granted to J. S.

fied and confirmed the interlocutory decree theretofore made and interpoſed of revocation of the letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed, theretofore granted to the ſaid *Alexander Davies* by the ſaid judge, from whom there was in that behalf an appeal in the firſt inſtance of the ſaid cauſe, theretofore made and interpoſed, as by the definitive ſentence of the ſaid judges delegates more fully appears. By virtue of which ſaid premiſes, the ſaid judgment ſo as aforeſaid given, for the ſaid *Alexander Davies*, as adminiſtrator of the goods and chattels, rights and credits of the ſaid *Edmund Spicer*, againſt the ſaid *Edward Turner*, in our ſaid court before us ought to be void, and of no force in law againſt the ſaid *Edward*. And although by reaſon of the premiſes the ſaid *Edward Turner* is become, and is by the law of the land chargeable to the ſaid *John Spicer* of and for the ſaid 48l. in monies numbered, and for that reaſon of right is diſcharged, and ought to be diſcharged from every execution whatſoever for the ſaid damages, coſts and charges by reaſon of the ſaid judgment had or proſecuted againſt him at the ſuit of the ſaid *Alexander*, as the ſaid *Edward Turner* by ways and means convenient is ready to verify. Nevertheleſs the ſaid *Alexander Davies*, not conſidering the aforeſaid premiſes, but contriving very much to aggrieve the ſaid *Edward Turner* in this behalf, has now lately ſued out execution thereupon againſt the ſaid *Edward Turner*, and unjuſtly endeavours, and daily threatens, under colour and pretence thereof, to take and arreſt the ſaid *Edward Turner* by his body in execution for the damages aforeſaid, to the manifeſt damage, prejudice and grievance of the ſaid *Edward Turner*, and againſt the law and cuſtom of our realm of *England*; whereupon the ſaid *Edward Turner* beſought us of a fit remedy to be provided for him in this behalf, and we being unwilling that the ſaid *Edward Turner* ſhould be in any wiſe injured, and being willing that what is juſt ſhould be done in this behalf, that having heard the complaint of the ſaid *Edward Turner* in this behalf, and having called before you the ſaid parties, and others whom you ſhall think meet to call in this behalf, and having hence heard thereupon their reaſons, you cauſe full and ſpeedy juſtice to be done to the parties

by reaſon thereof the judgment by defendant againſt plaintiff is void.

Breach that the defendant has taken out execution againſt the plaintiff, and threatens to arreſt him.

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ties aforeſaid, as according to law and the cuſtom of our realm of *England* you ſhall think fit and juſt to be done. Witneſs ourſelf at *Weſtminſter* the 27th day of *November* in the 21ſt year of our reign. Afterwards, to wit, on *Monday* next after 15 days of St. *Martin* in this ſame term, before our lord the king at *Weſtminſter*, came the ſaid *Edward Turner* by *Edward Coleman* his attorney, and immediately ſaid, that whereas the ſaid *Edmund Spicer* heretofore, to wit, on the 1ſt day of *July* in the 20th year of the reign of our ſaid lord the now king, at *London* aforeſaid died inteſtate, after whoſe death, to wit on the 21ſt day of *July* in the aforeſaid 20th year of the reign of our ſaid lord the now king, at *London* aforeſaid, adminiſtration of all the goods and chattels, which were of the ſaid *Edmund Spicer* at the time of his death, was committed by *Thomas Exton* doctor of law, ſurrogate lawfully appointed of the venerable *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colcheſter*, to one *Alexander Davies* as principal creditor of the ſaid *Edmund*, and that by virtue of the ſaid adminiſtration to the ſaid *Alexander Davies* ſo as aforeſaid committed, the ſaid *Alexander Davies*, as adminiſtrator of the goods and chattels of the ſaid *Edmund Spicer* afterwards, that is to ſay, in the term of St. *Michael* in the aforeſaid 20th year of the reign of our ſaid lord the now king, came into the court of our ſaid lord the king before the king himſelf at *Weſtminſter* in the county of *Middleſex*, by *Richard Somer* then his attorney, and brought then there into the ſaid court his certain bill againſt the ſaid *Edward Turner* in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe, and there were pledges of proſecution, to wit *John Doe* and *Richard Roe*, by which ſaid bill, the ſaid *Alexander Davies*, as adminiſtrator of all and ſingular the goods and chattels aforeſaid, by the name of *Alexander Davies*, adminiſtrator of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *Edmund Spicer*, complained of the ſaid *Edward Turner* then being in the cuſtody of the marſhal of the marſhalſea of our ſaid lord the king before the king himſelf, for this, to wit, that (3) whereas the ſaid *Edmund* in his life-time, that is to ſay on the 1ſt day of *July* in the 20th year of the

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Declaration ſame with the writ *mutatis mutandis*.

(3) See p. 137. note (1).

reign

reign of our ſaid lord the now king at the pariſh of *Barking* in the county of *Eſſex*, was poſſeſſed of 48l. in monies numbered as of his own proper monies, and being ſo thereof poſſeſſed the ſaid *Edmund* afterwards, to wit, on the day and year in the ſaid bill above-mentioned at *Barking* aforeſaid in the county aforeſaid, died ſo poſſeſſed of the ſaid monies, after the death of which ſaid *Edmund* the ſaid monies afterwards came into the hands and poſſeſſion of the ſaid *Edward* by finding, and that afterwards, to wit, on the 21ſt day of *July* in the 20th year aforeſaid, adminiſtration of all and ſingular the goods and chattels, rights and credits, which were of the ſaid *Edmund Spicer*, at *Barking* aforeſaid in the county aforeſaid, was in due manner committed by the aforeſaid *Thomas Exton* doctor of law, ſurrogate of the ſaid venerable *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colcheſter*, to the ſaid *Alexander* principal creditor of the ſaid *Edmund*, and that the ſaid *Edward*, [142] although he well knew that the ſaid monies were the proper monies of the ſaid *Edmund* in his life-time, and of right did belong and appertain to the ſaid *Alexander* after the death of the ſaid *Edmund* by reaſon of the adminiſtration aforeſaid, yet contriving and fraudulently intending craftily and ſubtilely to deceive and defraud the ſaid *Alexander* of the monies aforeſaid in that behalf, (4) had not then delivered to the ſaid *Alexander* the monies aforeſaid, (although the ſaid *Edward* afterwards, to wit, on the 1ſt day of *September* in the 20th year aforeſaid, at *Barking* aforeſaid, in the county aforeſaid, was requeſted by the ſaid *Alexander*,) but that the ſaid *Edward* afterwards, to wit, on the ſaid 1ſt day of *September* in the 20th year aforeſaid at *Barking* aforeſaid in the county of *Eſſex* aforeſaid, had converted and diſpoſed thereof to his own uſe and benefit, to the damage of the ſaid *Alexander* of 5ol. and thereupon he then brought ſuit, &c. And the ſaid *Alexander* brought then there into the ſaid court of our ſaid lord the king before the king himſelf the letters of adminiſtration aforeſaid, which teſtified the committing of the adminiſtration aforeſaid, in form aforeſaid, the date whereof was the ſame day and year aforeſaid. And whereas alſo ſuch proceedings were had in the ſaid court of our ſaid lord the

(4) See p. 138. note (2).

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the king before the king himſelf upon the ſaid bill ſo as aforeſaid exhibited againſt the ſaid *Edward Turner*, in the ſaid court of our ſaid lord the king before the king himſelf, that afterwards, to wit, in the term of *Eaſter* in the 21ſt year of the reign of our ſaid lord the now king, it was conſidered by the ſaid court of our ſaid lord the king before the king himſelf, the ſaid court then being at *Weſtminſter* aforeſaid, that the ſaid *Alexander* ſhould recover againſt the ſaid *Edward Turner* 51l. for his damages, which he had ſuſtained as well on occaſion of the premiſes, as for his coſts and charges by him about his ſuit in that behalf expended, as by the record thereof remaining in the court of our ſaid lord the king before the king himſelf at *Weſtminſter* aforeſaid, more fully appears. And whereas alſo afterwards, to wit, on the 21ſt day of *June* in the year of our Lord 1669 at *Weſtminſter* aforeſaid, before Sir *John Kelynge* knt. chief-juſtice of our ſaid lord the king aſſigned to hold pleas before the king himſelf, Sir *William Wylde* knt. and bart. one of the juſtices of our ſaid lord the king of the bench, *Leoline Jenkins* doctor of law, judge or lieutenant of the high court of admiralty of *England*, Sir *Juſtinian Lewin*, and Sir *Walter Littleton*, knts. and doctors of law, *John Mills*, *Edward Alderne*, *Timothy Baldwin*, and *Richard Lloyd*, doctors of law, judges rightly and lawfully delegated and appointed by a commiſſion under our ſaid lord the king's great ſeal of *England*, the merits and circumſtances of a certain principal cauſe of revocation of a grant of letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer*, been heard, ſeen and underſtood, and fully and maturely diſcuſſed by virtue of an appeal in that behalf devolved, which was agitated and depending undecided before them in judgment, by virtue of a commiſſion of appeal under our ſaid lord the king's great ſeal
[143] of *England*, between the ſaid *Alexander Davies*, party appellant and complainant of the one part, and one *John Spicer*, natural and lawful brother on the ſide of the father of the ſaid deceaſed, party appellant and complainant, of the other part, the ſaid judges delegates rightfully and lawfully proceeding, the parties aforeſaid lawfully appearing by their proctors before the ſaid judges delegates in judgment, the party of the

the ſaid *John Spicer*, that ſentence ſhould be given and juſtice done for his party, but the party of the ſaid *Alexander Davies*, ſentence alſo for his party preſent, reſpectively demanding and praying; the ſaid judges delegates having the whole and entire proceſs in ſuch caſe before them, proceeded to the definitive ſentence of them the ſaid judges delegates in manner and form following, that is to ſay, that becauſe to the ſaid judges delegates, inaſmuch as from the things done, enacted, deducted, propoſed, alleged and proved in ſuch caſe, it appeared clearly found on the party of the ſaid *John Spicer*, that his intention, in a certain allegation made among the acts of the judge from whom in that behalf it was appealed in the firſt inſtance of the cauſe, and in the proceedings of the ſaid judge in that behalf tranſmitted mentioned, and in the ſame cauſe exhibited to the ſaid judges delegates as aforeſaid, was ſufficiently, and fully founded and proved, and that nothing effectual to the contrary on the part of the ſaid *Alexander Davies* in that behalf was deduced, excepted, propoſed, alleged or proved, which ſhould elude, or in any manner weaken, the intention of the ſaid *John Spicer* in that behalf, therefore the judges delegates as aforeſaid, having firſt called on the name of Chriſt, and putting and having God alone before their eyes, by and with the advice of the learned in the law, with whom in this behalf they communicated, and maturely deliberated, did pronounce, decree and declare that the ſaid *John Spicer* was and is, in the common reputation of men, the natural and lawful brother of the ſaid *Edmund Spicer* deceaſed, of whoſe rights and credits it was in that cauſe debated, and for the intereſt of the ſaid *John Spicer*, and pronounced and declared that it was rightfully, and lawfully proceeded in, pronounced, decreed and revoked by *Lewis Griffin* clerk, ſurrogate of the ſaid venerable *Thomas Exton* doctor of law official in and throughout the whole archdeaconry of *Colcheſter*, judge in the firſt inſtance of the ſaid cauſe, and alſo pronounced and declared that the letters of adminiſtration of the goods, rights, and credits of the ſaid *Edmund Spicer* deceaſed, theretofore granted to the ſaid *Alexander Davies* by the judge from whom there was an appeal in this behalf in the firſt inſtance of the ſaid cauſe, were in fact badly,

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badly, and unjuſtly, and againſt the order of law granted to the ſaid *Alexander Davies*, and pronounced, decreed and declared that letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed ſhould, and of right ought, under proper ſecurity to be committed to the ſaid *John Spicer*, and accordingly they committed the ſame to the ſaid *John Spicer* ſworn in due form of law, and ratified and confirmed the interlocutory decree theretofore made and interpoſed of revocation of the letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed, theretofore granted to the ſaid *Alexander Davies* by the ſaid judge from whom there was an appeal in that behalf in the firſt inſtance of the cauſe, as by the definitive ſentence of the ſaid judges delegates more fully appears. By virtue of which ſaid premiſes the ſaid judgment ſo as aforeſaid given for the ſaid *Alexander Davies*, as adminiſtrator of the goods and chattels, rights and credits of the ſaid *Edmund Spicer*, againſt the ſaid *Edward Turner* in the ſaid court of our ſaid lord the king before the king himſelf, ought to be void, and of no force in law againſt the ſaid *Edward*. And although by reaſon of the premiſes the ſaid *Edward* became and is by the law of the land chargeable to the ſaid *John Spicer* of and for the ſaid 48l. in monies numbered, and for that reaſon is diſcharged, and ought to be diſcharged from every execution whatſoever for the ſaid damages, coſts and charges by reaſon of the ſaid judgment had or proſecuted againſt him at the ſuit of the ſaid *Alexander*, as the ſaid *Edward Turner* by ways and means convenient is ready to verify. Nevertheleſs the ſaid *Alexander Davies*, not conſidering the aforeſaid premiſes, but contriving very much to aggrieve the ſaid *Edward Turner* in this behalf, has now lately ſued out execution thereupon againſt the ſaid *Edward Turner*, and unjuſtly endeavours, and daily threatens, under colour and pretence thereof, to take and arreſt the ſaid *Edward Turner* by his body in execution for the damages aforeſaid, to the manifeſt damage, prejudice and grievance of the ſaid *Edward Turner*, and againſt the law and cuſtom of this realm of *England*; and this the ſaid *Edward* is ready to verify; wherefore he prays judgment, and that the ſaid *Alexander Davies* may be barred from having any execution whatſoever of and upon

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the ſaid judgment ſo as aforeſaid recovered againſt him the ſaid *Edward Turner*, and that he may be reſtored to all things which he has loſt by occaſion of the judgment aforeſaid, &c. and that the ſaid *Alexander* ſhould come here into court to anſwer of and upon the premiſes, &c. But becauſe it is unknown to the court of our ſaid lord the king now here whether the allegations of the ſaid *Edward Turner* in this behalf are true or not, therefore the ſheriff of *Eſſex* is commanded that he ſhould cauſe the ſaid *Alexander* to come before our ſaid lord the king from the day of *Eaſter* in three weeks, whereſoever he ſhall then be in *England*, to anſwer of and upon the premiſes, and further to and receive what the court of our ſaid lord the king now here before the king himſelf ſhall conſider in this behalf; the ſame day is given to the ſaid *Edward Turner*, &c. At which day before our lord the king at *Weſtminſter*, comes the ſaid *Edward Turner* in his proper perſon, and offers himſelf againſt the ſaid *Alexander* in the plea aforeſaid.

And the ſaid *Alexander Davies* being ſolemnly called comes by *Richard Somer* his attorney, and ſays that he, by any thing by the ſaid *Edward Turner* above alleged, ought not to be barred from having his execution of and upon the ſaid judgment, becauſe, proteſting that the ſaid judgment given in the ſaid court for the ſaid *Alexander* ought not to be void, and of no force in law againſt the ſaid *Edward*; proteſting alſo that the ſaid *Edward Turner* is not become chargeable to the ſaid *John Spicer* of and for the ſaid 48l.; for plea ſays, that well and true it is, that the ſaid *Edmund Spicer* in the ſaid writ named died inteſtate, and that after his death adminiſtration of all the goods and chattels which were of the ſaid *Edmund Spicer* at the time of his death was lawfully committed to the ſaid *Alexander Davies* as principal creditor of the ſaid *Edmund* by the ſaid *Thomas Exton* doctor of law, ſurrogate lawfully appointed, and having lawful authority and right in that behalf, of the venerable *William Wells* doctor of divinity official of the archdeaconry of *Colcheſter*; and the ſaid *Alexander* further ſays, that before any revocation or repeal of the ſaid letters of adminiſtration, and before any appeal from the committing of the ſaid adminiſtration

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admits that adminiſtration of the effects of E. S. was granted to the defendant;

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adminiſtration to the ſaid *Alexander* was brought, made or proſecuted, that is to ſay, on the ſaid 21ſt day of *September* in the ſaid bill of the ſaid *Alexander* ſpecified, the ſaid *Edward* at *Barking* aforeſaid converted and diſpoſed of the ſaid goods and chattels in the ſaid bill ſpecified to his own uſe and benefit, wherefore the ſaid *Alexander* afterwards and before any revocation or repeal of the ſaid letters of adminiſtration, and before any appeal from the committing of the ſaid adminiſtration to the ſaid *Alexander* was brought, made or proſecuted, that is to ſay, in the ſaid term of St. *Michael* in the aforeſaid 20th year of the reign of our ſaid lord the now king, brought into the court of our ſaid lord the king in the ſaid court before the king himſelf his ſaid bill againſt the ſaid *Edward Turner* in manner and form as the ſaid *Edward Turner* has above alleged; and that afterwards and before any revocation or repeal of the ſaid letters of adminiſtration, and before any appeal was brought or proſecuted from the committing of the adminiſtration aforeſaid, ſuch proceedings were had upon the ſaid bill of the ſaid *Alexander*, that the ſaid *Alexander* in the ſaid term of *Eaſter*, in the 21ſt year of the reign of our lord the now king, by the conſideration of the ſaid court recovered againſt the ſaid *Edward* the ſaid 51l. for his damages which the ſaid *Alexander* had ſuſtained as well on occaſion of the premiſes, as for his coſts and charges by him about his ſuit in that behalf expended, as by the ſaid record thereof remaining in the ſaid court of our lord the king before the king himſelf at *Weſtminſter* more fully and at large appears. And the ſaid *Alexander* further ſays, that he the ſaid *Alexander*, after the committing of the ſaid adminiſtration to the ſaid *Alexander*, and after the converſion of the goods and chattels aforeſaid by the ſaid *Edward Turner*, to wit, on the 21ſt day of *Auguſt* in the aforeſaid 20th year of the reign of our ſaid lord the now king at *Barking* aforeſaid, was cited by a certain proceſs of citation ſued out at the promotion of *John Spicer* natural brother of the ſaid *Edmund Spicer* to appear before the ſaid venerable *Thomas Exton* official aforeſaid, in the pariſh church of St. *Peter* in the town of *Colcheſter*, in a judicial plea there on the 29th day of the ſaid month of *Auguſt*,

but the defendant ſays, that before the adminiſtration was repealed, and before any appeal for that purpoſe, the defendant obtained the ſaid judgment againſt the plaintiff in the ſaid action of trover.

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Auguſt, to exhibit and produce the ſaid letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer* deceaſed, or otherwiſe ſhew reaſonable cauſe, if any he had, or could allege, why the ſaid letters of adminiſtration ſhould not be quaſhed, revoked and annulled, and alſo why letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed, ſhould not be granted to the ſaid *John Spicer*; at which day and place, the ſaid *Alexander* by *Godfrey Lee* notary public, and his proctor, appearing before *Lewis Griffin* clerk ſurrogate of the ſaid official, the ſaid ſurrogate revoked the ſaid letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer* as aforeſaid granted to the ſaid *Alexander*, the ſaid *Alexander* diſſenting and then and there appealing to the court of *Canterbury* of the arches *London*, and lord official thereof, and praying to be given to him, &c. and a competent term to be aſſigned to proſecute the ſaid appeal, and to certify the proſecution thereof; which ſaid appeal from the revocation of the ſaid letters of adminiſtration to the ſaid *Alexander* in due manner proſecuted in the ſaid court of *Canterbury* of the arches aforeſaid *London*, before Sir *Giles Sweit* principal official of the ſaid court lawfully conſtituted, until the 20th day of *January* in the 20th year of the reign of our ſaid lord now king of *England*, &c., on which day he the ſaid *Alexander* conceiving that he was grievouſly hurt by certain grievances, nullities, unjuſt and injurious things decided againſt him, by the ſaid Sir *Giles Sweit* principal official of the ſaid court of *Canterbury* of the arches *London*, in the ſaid cauſe of appeal depending before him in judgment between the ſaid *Alexander Davies* appellant of the one part, and the ſaid *John Spicer* appellant and complainant of the other part, and that he might by future enormities be unjuſtly prejudiced and aggrieved, rightfully and lawfully appealed from the ſame, and every of them, and eſpecially from the revocation of the letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer*, granted by a judge competent in that behalf, to our ſaid lord the king in his court of chancery, the ſaid court then being at *Weſtminſter* aforeſaid, and that afterwards and after the ſaid judgment by the ſaid *Alexander*

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in form aforeſaid had againſt the ſaid *Edward Turner*, to wit, on the ſaid 21ſt day of *June* in the aforeſaid year of our Lord 1669, and not before, until which day the ſaid appeal and cauſe of appeal of the ſaid *Alexander* laſt mentioned was depending undetermined and undecided before the ſaid judge, by the commiſſion of our ſaid lord the king under the great ſeal of *England* in that behalf rightfully and lawfully delegated and conſtituted, the ſaid judges ſo as aforeſaid delegated, pronounced and declared that proceſs was well, rightfully and lawfully pronounced, decreed and revoked by the ſaid *Lewis Griffin* clerk, ſurrogate of the ſaid *Thomas Exton* official in and throughout the whole archdeaconry of *Colcheſter*, judge in the firſt inſtance of the ſaid cauſe, and alſo pronounced and declared that the letters of adminiſtration of the goods, rights and credits of the ſaid *Edmund Spicer* deceaſed heretofore granted to the ſaid *Alexander Davies* were granted badly and unjuſtly and againſt the order of law to the ſaid *Alexander Davies*, and pronounced, decreed and declared that letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed ſhould and of right ought to be committed to the ſaid *John Spicer*, and committed the ſame to the ſaid *John Spicer*, and ratified and confirmed the interlocutory decree of revocation of the letters of adminiſtration of the goods, rights and credits of the ſaid deceaſed granted to the ſaid *Alexander*, as the ſaid Edward has above alleged. And this he is ready to verify: wherefore inaſmuch as the ſaid letters of adminiſtration, granted as aforeſaid to the ſaid *Alexander*, were and continued in their full force and effect at the time of giving the ſaid judgment for the ſaid *Alexander* againſt the ſaid *Edward Turner*, the ſaid *Alexander* prays judgment, and that the recovery aforeſaid may ſtand in full force and effect, &c.

Demurrer.

And the ſaid *Edward Turner* ſays, that the ſaid plea by the ſaid *Alexander Davies* above pleaded in bar, and the matter in the ſame contained, are not ſufficient in law to bar him the ſaid *Edward* from vacating and avoiding execution upon the ſaid judgment, to which ſaid plea the ſaid *Edward* has no neceſſity, nor is bound by the law of the land in anywiſe to anſwer. And this he is ready to verify; wherefore for

want of a ſufficient plea in this behalf, the ſaid *Edward*, as before, prays judgment, and that the ſaid *Alexander Davies* may be barred from having any execution whatſoever of and upon the ſaid judgment ſo recovered, and that he the ſaid *Edward* may be reſtored to all things which he has loſt by occaſion of the ſaid judgment, &c.

Joinder in demurrer.

And the ſaid *Alexander*, ſince he has above alleged ſufficient matter in his aforeſaid plea to bar the ſaid *Edward* from vacating and avoiding execution upon the ſaid judgment, which he is ready to verify, which ſaid matter the ſaid *Edward* does not deny, nor does in anywiſe anſwer the ſame, but altogether refuſes to admit that verification, as before, prays judgment, and that the ſaid recovery ſhall ſtand in its full force and effect. And becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day is therefore given to the parties aforeſaid before our lord the king until 15 days of the *Holy Trinity* whereſoever, &c. to hear their judgment thereupon, becauſe the court of our lord the king here is thereof not yet, &c. At which day before our lord the king at *Weſtminſter* come the parties aforeſaid by their attornies aforeſaid, whereupon all and ſingular the premiſes being ſeen, and by the court of our lord the king now here more fully underſtood, and mature deliberation thereupon had, for that it appears to the court of our lord the king here that the ſaid plea by the ſaid *Alexander Davies* above pleaded in bar, and the matter in the ſame contained, are not ſufficient in law to bar the ſaid *Edward* from vacating and avoiding execution upon the ſaid judgment, it is conſidered that the ſaid *Alexander Davies* have no execution againſt the ſaid *Edward Turner*, or againſt any lands, tenements, goods or chattels of the ſaid *Edward* by reaſon of the ſaid judgment, and that he the ſaid *Edward* be reſtored to all things which he has loſt by occaſion of the ſaid judgment, &c. (1)

Curia adviſare vult.

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(1) An *auditâ querelâ* is an equitable action which lies for a perſon who either is in execution, or in danger of being ſo, upon a judgment, ſtatute-merchant, ſtatute-ſtaple, or recogniſance, when he has matter to ſhew that ſuch

execution ought not to have iſſued, or ſhould not iſſue, againſt him; and is of a moſt remedial nature, and ſeems to have been invented, leſt in any caſe there would be an oppreſſive defect of juſtice, where the party has a good defence, but had not, nor has any other means to take advantage of it. Com. Dig. *Auditâ Querelâ* (A.) 3 Black. Com. 405. As if B. be taken in execution upon the ſtatute acknowleged by A. in his name. F. N. B. 233. A. 7th edit. Or, where execution is ſued out upon a ſtatute taken without authority, or not duly ſealed. Cro. Eliz. 233. *Aſcue* v. *Faljambe*. So if, upon a joint and ſeveral bond, one of the obligors is ſued in the K. B. and taken in execution, and the other in the C. B., and his lands are taken in execution by *elegit*, as they may well be, an *auditâ querelâ* lies for him who is taken in execution; and becauſe the judgment muſt be, that he be diſcharged from the execution, he cannot be taken again, though the land taken in execution ſhould be evicted. Hob. 2. 2 Eulſt. 97. *Cowley* v. *Lydeot*. S. C. So if the defendant has paid and ſatisfied the judgment, and is afterwards taken in execution, he may be relieved by *auditâ querelâ*, though he has no writing for the payment. Cro. Jac. 29. *Ognel* v. *Randol*, by three judges againſt *Popham*. So if there is judgment againſt two, who are both in execution, and the ſheriff ſuffers one to eſcape, and the plaintiff recovers againſt the ſheriff, *and has ſatisfaction*, the other ſhall be diſcharged by an *auditâ querelâ*. 2 Mod. 49. *Alford* v. *Tatnel*. 1 Mod. 170. S. C. So if a man be, as is already noticed, only *in danger* of being taken in execution, an *auditâ querelâ* lies, *quia timet*. Co. Litt. 100. a. and therefore the conuſor of a ſtatute, or a defendant againſt whom a judgment has been obtained, may have it before execution ſued. 1 Roll. Abr. 306. (B.) pl. 6. And ſo may the heir of the conuſor, Ibid. pl. 7 and the conuſor or his heir may have an *auditâ querelâ* before any ſuit is commenced upon the ſtatute. Ibid pl. 8 And if there is a verdict for plaintiff at *niſi prius*, and afterwards, and before the day in bank, he releaſes the defendant, and afterwards ſigns judgment, as the defendant cannot plead the releaſe, he may have an *auditâ querelâ* to hinder the execution of the judgment. Gilb. C. B. 103. 3d edit. But it is ſaid that he ſhall not have an *auditâ querelâ* until there be judgment againſt him, for perhaps the plaintiff never will enter up his judgment 1 Roll. Abr. 306. (B.) pl. 10. However, though it cannot be brought before judgment entered, yet as it may be out of the defendant's power to bring an *auditâ querelâ* before he is taken in execution, inaſmuch as the plaintiff may get judgment ſigned, and take out execution on a ſudden, and behind the defendant's back, therefore it was ſaid by *Hale* C. J. that if an *auditâ querelâ* be brought after the day in bank, though the judgment be not entered up the court will make the plaintiff enter his judgment *as of the day in bank*; ſo that he ſhall not plead "*nul tiel record.*" 1 Mod. 111. *Lampiere* v. *Mereday*.

And if there is judgment againſt A. in the common pleas, and againſt B. and C. in the king's bench for the *ſame* treſpaſs, and A. ſatisfies the judgment againſt

againſt him, and ſatisfaction is acknowledged, and afterwards execution is ſued out againſt B. he may have an *auditâ querelâ*; for though the plaintiff has a right to bring ſeveral actions for the ſame treſpaſs, and recover in them all, yet when judgment and ſatisfaction is had againſt one, the plaintiff cannot have another ſatisfaction, any more than when an obligee ſues one of two obligors in a joint and ſeveral bond in the common pleas and recovers, and afterwards ſues the other in the king's bench and recovers, if one of them makes ſatisfaction, the other ſhall have an *auditâ querelâ* to avoid execution againſt him, for the plaintiff can only have one ſatisfaction. And in this caſe C. may join in the *auditâ querelâ*, though he is not yet aggrieved, for he is privy to the judgment againſt B. Sir. W. Jones, 377, 378. *Corlet* v. *Parnes*. Cro. Car. 443. S. C.

An *auditâ querelâ* is a commiſſion to the judges to examine the cauſe. Cro. Jac. 29. *Ognell* v. *Randol*, and is in nature of a treſpaſs; therefore where it was brought againſt two executors and one only appeared, and the other made default, he who appeared was awarded to anſwer alone: and *damages* are given if the execution be without right. 2 H. 4. 17. b. Bro *Damages*. 38. *Executors*, 42. And it is ſaid that it commenced only in the 10th year of Edward III. Sir T. Raym. 89. *Young* v. *Colet*. And it does not lie where there is any other remedy at law either by plea, or otherwiſe. Ibid. And therefore where the party had time to take advantage of the matter which he has in diſcharge of himſelf, and neglected it, he cannot afterwards be relieved by *auditâ querelâ*. 1 Roll. Abr. 306. (C) pl. 1. As where the plaintiff having obtained judgment againſt the defendant releaſes it, and afterward brings a *ſcire facias* upon the judgment, the ſheriff returns *ſcire feci*, the defendant does not appear, and there is a judgment upon it, he cannot have an *auditâ querelâ*, for he had time to plead the releaſe upon the return of the *ſcire facias*, and having neglected it, the law will not relieve him and if in truth he was not warned he has his remedy againſt the ſheriff for a falſe return; but it is otherwiſe if *nihil* be returned on the *ſcire facias*. 1 Roll. Abr. 306. (C.) pl. 4 Hob. 283. *Hannor* v. *Maſe* F. N. B. 237. J. 7th edit. Finch Law 488, 489. Sir T. Raym. 19. *Day* v. *Guildford*. 1 Salk. 264. *Wicket* v. *Creamer*. 1 Ld. Raym. 439 S. C. 1 Wilſ. 98. *Cooke* v. *Ferry*. So if on a *ſcire facias* on a recogniſance the party is returned warned, and makes default, he cannot avoid it by *auditâ querelâ*, upon the ground that the recogniſance was upon condition, which he has performed, or other matter, becauſe he had a day to anſwer it. 1 Roll. Abr. 336. (C.) pl. 2. 1 Salk. 264 *Wicket* v. *Creamer*. Moor. 536. *Very* v. *Carew*. No perſon is entitled to have an *auditâ querelâ*, who is not the party grieved. Sir W. Jones, 90. *Blakſton* v. *Martyn*. So an *auditâ querelâ* does not lie, where the matter alleged does not *diſcharge* the party; as where two perſons are bound jointly and ſeverally in a bond, and one of them is ſued and taken in execution, and afterwards the other is ſued and taken in execution, and then one dies, or eſcapes, the other is not entitled to an *auditâ querelâ*, for the death or eſcape of one is no diſ-

charge to the other. 5 Rep. 86. b. *Blumfield*'s caſe. Co. Ent. 87. a.

However in general the courts will not put the defendant to the trouble and expence of an *auditâ querelâ*, but will relieve him in a ſummary way on motion. 4 Burr. 2287, *Sutton* v. *Biſhop*; but where the ground of his relief is a releaſe, when there is ſome doubt about the execution, or ſome matter of fact which cannot be clearly aſcertained by affidavit, and therefore proper to be tried, the court has driven the defendant to his *auditâ querelâ*. 1 Salk. 264. *Wicket* v. *Creamer*. 1 Ld. Raym. 439. 12 Mod. 240. S. C. 1 Salk. 93. *Anon.* 2 Ld. Raym. 1295. *Ludlow* v. *Lennard*. 2 Str. 1198. *Mitford* v. *Cordwell*. S.P. And indeed the indulgence which of late has been ſhewn by courts of law in granting a ſummary relief upon motion in moſt caſes of evident oppreſſion, for which the only remedy formerly was by *auditâ querelâ*, has occaſioned this remedy now to be ſeldom reſorted to. It is however ſometimes adopted at preſent. An *auditâ querelâ* was brought in the king's bench by Lord *Portcheſter* againſt *Petrie*, which was decided in Trin. 23 Geo. 3. the caſe was this:

The writ ſet out the record in an action by *Petrie* againſt Lord *Portcheſter* for bribery; the declaration in that action ſtated that, on the 2d day of *September* 20 Geo. 3., a writ iſſued to the ſheriff of *Wilts*, to elect knights, and citizens and burgeſſes for the county, and cities and boroughs within it; that on the 5th of *September* the ſheriff iſſued his precept for an election of two burgeſſes for the borough of *Cricklade*, and on the 11th the election was had, when *Benfield*, *Macpherſon* and *Petrie* were candidates, and that *Macpherſon* was the friend of Lord *Portcheſter*; and that Lord *Portcheſter* bribed one *Thomas Mann Gunn* a voter, to give his vote for his friend, whereby and by force of the ſtatute, an action had accrued to the ſaid *Petrie* to demand, and have of and from the ſaid Ld. P. and for his ſaid offence 500l. parcel, &c. Then followed 99 other counts for bribery by Ld. *P.* or his agent *Bristow* of 50 different perſons, all laid on the 11th *September*; the iſſue was of *Eaſter* term, and the *venire* was awarded and continued as uſual, and the trial was at *Saliſbury*, 28th *July* 1781, and a verdict was found for *Petrie* upon four counts, after which was ſtated the judgment given for *Petrie* for 2000l. (the amount of four penalties,) and 142l. coſts, which was on *Tueſday* next after the morrow of All Souls. The *auditâ querelâ* then ſtated that before the ſaid election, to wit, on the 11th of *September*, one *W. Hinton* did corruptly aſk the ſaid Lord *Portcheſter* to give him the ſum of five guineas to vote for *Macpherſon*; that after committing the ſaid offence by *W. Hinton*, and after the committing of the ſaid ſeveral offences by the ſaid Ld. *P.* and within 12 months next after the ſaid election, to wit, on the 29th *May* 1781. Ld. *P.* diſcovered to one *Richards* the offence of the ſaid *W Hinton*, to the intent that *Richards* might proſecute *Hinton* to conviction, he the ſaid Ld. *P.* not having been then convicted of any offence againſt the ſaid ſtatute; that in *Trinity* term 21 Geo. 3. *Richards* impleaded *Hinton* in K.B.: then followed the declaration againſt *Hinton*, containing four counts for bribery on the 11th of *September*, the

the *venire, poſtea*, verdict for *Richards* on one count for 500l, the judgment, which, like the judgment in the ſaid action by *Petrie* againſt Lord *Portcheſter*, was on *Tueſday* next after the morrow of All Souls; that the ſaid judgment continued in force, and which ſaid offence whereof the ſaid *W. Hinton* was convicted was the ſame offence which Ld. *P.* had ſo diſcovered to *Richards*; "and although the defend-"ant by reaſon of the ſaid diſcovery "and conviction, is and ought to be in-"demnified and diſcharged from the "ſaid penalties and coſts ſo recovered "againſt him by *Petrie*, and the diſ-"ability upon the ſaid judgment, never-"theleſs the ſaid *Petrie* unjuſtly "threatens to ſue out execution." The record then further ſtated that Ld. *P.* prayed a writ of ſuperſedeas to the ſheriff of *Wilts*, to ceaſe from all manner of execution upon the ſaid judgment againſt him until the court ſhall give judgment upon the *auditâ querelâ*, and it was granted. And he alſo prayed proceſs againſt *Petrie*, which was granted, and ſtated *Petrie*'s appearance. Then Ld. *P.* declared on the *auditâ querelâ*, which, as uſual, was only a repetion of the writ, and concluded with praying judgment, and that *Petrie* might be barred from having any execution whatſoever of the ſaid judgment, and that he the ſaid Ld. *P.* might be reſtored to all things which he had loſt by occaſion of the ſaid judgment.

The defendant *Petrie* pleaded that before the ſaid election, to wit, on the 11th day of *September*, one *Hopkins* a voter corruptly received from *Briſtow* the ſum of five guineas to vote for *Macpherſon*; that after the committing the ſaid offence, and after the offence by *Hinton*, and before Ld. *P.* made the diſcovery to *Richards*, namely on the 30th *September* 1780, *Hinton* diſcovered *Hopkins*'s offence to *Petrie*, and that before Ld. *P.* made the diſcovery to *Richards*, namely on the 21ſt of *May* 1781, *Petrie* ſued out a *latitat* againſt *Hopkins*, and in *Trinity* term following declared againſt him. The plea then ſtated the proceedings in the action by *Petrie* againſt *Hopkins*, in which the *niſi prius* day was alſo on the 28th *July* 1781, and verdict for *Petrie* for one penalty, and judgment on *Tueſday* next after the morrow of All-Souls 22 Geo. 3. that the judgment remained in full force; and then *Petrie* averred "that "the ſaid judgment ſo given againſt "*Hopkins* was in fact given before the "judgment againſt *Hinton* in the action "ſo commenced againſt him by *Rich-*"*ards*," whereby *Hinton* was indemnified. And in order to obtain ſuch indemnity, *Hinton* on the 12th of *February* 22. Geo. 3. ſued out a writ of *auditâ querelâ* againſt *Richards*, which was then depending, "and this the ſaid *Petrie* is "ready to verify." To this plea Ld. *P.* replied that the judgment againſt *Hinton* is the action againſt him by *Richards* was given before the judgment againſt *Hopkins*, and traverſed that the judgment againſt *Hopkins* was given before the judgment againſt *Hinton*, "and this he is ready to "verify." The rejoinder took iſſue on the traverſe, and concluded to the country. To the rejoinder Ld. *P.* demurred, and aſſigned for cauſe that "it appears from the proceedings in "this cauſe that the ſaid judgment "againſt *Hopkins*, and the judgment againſt

" againſt *Hinton*, were given at one and " the ſame time, that is to ſay, on the " ſame *Tueſday* next after the mor- " row of All Souls, and therefore " the averment in the plea that the " judgment againſt *Hopkins* was given " before the judgment againſt *Hin-* " *ton* is wholly inadmiſſible, or if " the ſame were admiſſible, yet that " the matter therein averred being mat- " ter of record ought to have been veri- " fied by the record of the judgment, " and to have been determined by the " court here, whereas the ſaid *Petrie* " has endeavoured to put the ſame in " iſſue to be tried by the country, and " for that the ſaid *Petrie* has not of- " fered to verify his ſaid plea, or the " matter therein alleged, by the re- " cords of the judgment, or by any " record whatever," &c. The defend- ant joined in demurrer, &c.

After this caſe had been twice ar- gued, Lord *Mansfield* delivered the re- ſolution of the court. He ſaid that four points had been made in argument, three on the form of the pleadings, and the fourth on the ſtatute 2 Geo. 2. c. 24. ſ. 8. which enacts, " that if any " perſon offending againſt this act ſhall, " within the ſpace of twelve months " next after ſuch election as aforeſaid, " diſcover any other perſon or perſons " offending againſt this act, ſo that ſuch " perſon or perſons ſo diſcovered be " thereupon convicted, ſuch perſon ſo " diſcovering, and not having been be- " fore that time convicted of any of- " fence againſt this act, ſhall be indem- " nified, and diſcharged from all pe- " nalties and diſabilities which he ſhall " then have incurred by any offence " againſt this act." The firſt queſtion that had been made was, whether priority of judgment could be averred, when it was admitted on the record that both judgments were given on the ſame day. 2. Whether the averment was to be tried by the country, or by the record. 3. Whether the plaintiff could demur after an iſſue taken on his own traverſe; and 4. Whether, admitting a judgment ob- tained by a diſcoverer to be an indem- nity, though of the ſame day with a judgment againſt him, a conviction of a perſon *indemnified* were an exemption within the ſtatute.

As to the firſt, it was laid down in 2 Burr. 967. *Johnſon* v. *Smith*, that judg- ments ſhould be deemed complete, and bind to all purpoſes by relation. There was no authority to contradict that rule of common law; and Cro. Car. 102. *Standford* v. *Cooper*, was a very ſtrong caſe in ſupport of it. There was the ſame attempt in Latch 53 *Gerrard* v. *Morris*, to make a fraction of a day; and ſo in 8 Mod. 189. *Miller* v. *Bradley*. From the argument in that caſe it muſt in fact have been a judgment of the morrow of the holy *Trinity* The caſes in 3 Keb. 426. 491. *Hutchins* v. *Tho- mas*. 2 Lev. 141. S.C. Cro. Eliz. 201. *Reg* v. *Harris*. Hob. 128. *Pie* v. *Coke*. Moor. 864. S. C. 2 Hawk. 275. 2 Str. 1169. *Jackſon* v. *Giſling*. 3 Burr. 1423. *Combe* v. *Pitt*, did not apply; for in them priority of *judgment* was not the queſtion, but priority of *juit*, which is the act of the party, but the judgment is the act of the court. Another ſtring of caſes as little applicable were thoſe of *Johnſon* v. *Smith*. 2 Burr. 950. *Wood* v. *Newton*. 1 Wilſ. 147. and *Foſter* v. *Bonner*. Cowp. 454. for they all turned upon the queſtion of what was the com- mencement

mencement of the ſuit. The application for the writ was an act of the party, and might be put in iſſue to be tried by the country.

But that rule was liable to two exceptions. One was, when the preciſe time of ſigning a judgment, or any other act of record, was made material by ſtatute; as the enrolment of a bargain and ſale, and judgments as they affect purchaſers. *Hinde*'s caſe, 4 Rep. 71, was determined on the ſtatute 27 H 8. c. 16. but the exceptions prove the rule. The other was by common law; as where there is a ſpecial memorandum of the bill having been filed on a particular day within the term, the judgment in that caſe will have relation only to the time of filing the bill. Yelv. 35. *Huys* v. *Wright*; the firſt reaſon aſſigned in that caſe was miſreported, and the ſecond was the only one on which the judgment could be ſupported. It was admitted on the record in that caſe, that the judgment was after the 20th of *May*. So in 8 Mod. 189. *Miller* v. *Bradley*, and 3 Salk. 212. it was ſaid by *Holt* C. J. that a judgment ſhould relate to the firſt day of the term; unleſs there were a memorandum to the contrary, as where there was a continuance of the cauſe until another day in the ſame term. Therefore they were of opinion there could be no ſuch averment. That made it unneceſſary to decide the two next queſtions; though the ſame reaſoning would go a good way to ſhew that the trial muſt be by the record.

The remaining queſtion was on the ſtatute as to the indemnity. That was quite new, and therefore to make it intelligible he would ſtate ſo much of the caſe as was applicable to that point, and the arguments that had been uſed.

Before Lord *Porcheſter* diſcovered *Hinton*, he (*Hinton*) diſcovered *Hopkins* and convicted him; *Hinton* ſued out an *auditâ querelâ*, which was depending. It had been objected on the part of Ld. *P.*, that the *auditâ querela* by *Hinton* was ſtill depending, and *non conſtat* that he would be exempted, and though the plea had ſtated the facts, the court ought not to decide on them, becauſe *Hinton* was not a party to that record; but to that the right anſwer had been given by the defendant's counſel, that *Hinton's auditâ querelâ* was ſtated only to ſhew that he was ſuing his remedy, and not that ſuing an *auditâ querelâ* would be ſufficient if the facts were not ſufficient.

The other queſtion was, Whether the court could decide on that record? There would be unequal juſtice if they could not; both parties were intereſted in it. Lord P. relied on the judgment againſt *Hinton* as his indemnity. *Petrie* muſt be entitled to ſhew it was not; he could bring no *auditâ querelâ*, nor conteſt it in any other way. All perſons were entitled to conteſt the fairneſs of a judgment when it became material to them. Suppoſe *Hinton* had ſubmitted, would that have barred *Petrie?*

It has alſo been objected on the part of Lord *P.*, that he was entitled although *Hinton* were indemnified. And it was ſaid to be like the caſe of an indemnity on conviction, and the offender pardoned after conviction. But it did not apply; in criminal caſes the *verdict* was the conviction, and where the offender was *convicted*, the party had performed the condition upon which the indemnity

was

was offered, and the mercy of the crown could not deveſt his right; but then it muſt be a *legal* conviction, for if it were on an inſufficient indictment, and judgment were arreſted, and the offender indicted on a new indictment, the accomplice was bound to appear on the ſecond trial. So it muſt be a legal conviction on that ſtatute. The queſtion was no more than, whether a conviction to entitle to indemnity was ſuch as might be followed up by puniſhment, or a mere form? The ſtate of the caſe decided it. The caſe of an inſufficient indictment, and the opinion of *Yates* J. in delivering the judgment of the court in 4 Burr. 2283. *Sutton* v. *Biſhop*, were deciſive. Here Lord *P.* had not ſubſtituted any other offender in his place. *Hinton* was not liable, and if Lord *P.* were indemnified, no example could be made.

It was ſaid that Lord *P.*'s merit was the ſame, becauſe he could not know of *Hinton*'s indemnity. The anſwer was, whatever his intention might be, he had not done what was required, and it was the act, not the intention, which the ſtatute applied to. For thoſe reaſons they were of opinion that there muſt be judgment for the defendant.

The *proceſs* in *auditâ querelâ* is a *venire facias*, and *diſtringas*, *alias* and *pluries diſtringas*, and if *non eſt inventus* or *nihil* be returned, the plaintiff may have a *capias* againſt the defendant. F. N. B. 239, V. 7th edit. Dyer. 297. b. If the party be *in execution*, the proceſs is a *ſcire facias*; but if not, a *venire facias*. Moor. 811. *Trot* v. *Spurling*. 1 Salk. 92. *Clerk* v. *Moor*. And if an *auditâ querelâ* is founded upon a record, the proceſs upon it is a *ſcire facias*, in like manner as where the party is in execution; but if it be grounded on matter of fact, or the party is not in execution, the proceſs is a *venire*. 1 Salk. 92. *Anon*. Where an *auditâ querelâ* is ſued *quia timet*, and the party at large, there never ſhall be a *ſcire facias*, but the proper proceſs is a *venire* and diſtreſs infinite. 1 Salk. 92. *Clerk* v. *Moor*.

An *auditâ querelâ* may be brought in the ſame court in which the record upon which it is founded remains, or returnable in the ſame court; and therefore if a man recovers judgment in the common pleas, or king's bench, and afterwards by deed releaſes it, and then ſues out execution, the defendant may have an *aucitâ querelâ* out of the common pleas or king's bench, where the record is; and yet he may have an *audita querelâ* out of chancery returnable in the common pleas or king's bench, and ſo it is ſometimes judicial, and ſometimes original. F. N. B. 239, 240. B. 7th Edit.

An *auditâ querelâ* is no ſuperſedeas; and therefore execution may be taken out, unleſs a ſuperſedeas be ſued forth; and if the *auditâ querelâ* be founded on a deed, it muſt be proved in court before a ſuperſedeas ſhall be granted. 1 Salk. 22. *Langſton* v. *Grant*. If the plaintiff be not in execution, there is no need of bail, for they are only neceſſary when a perſon in execution is to be diſcharged. Sir W. Jones, 378. *Corbet* v. *Barnes*. See the form of the bail-piece 2 Sell. Prac. 254. And the writ ſhall not be allowed, nor ſhall there be any ſuperſedeas thereupon unleſs the releaſe upon which it is founded be proved

proved by the witneſſes preſent in court. 1 Sid. 351. *Nuby* v. *Jenkins*. Where the defendant confeſſes the matter alleged, the plaintiff has judgment and diſcharge by confeſſion; but if the defendant denies it, the parties proceed to iſſue in fact or in law, as in other caſes. It is ſaid that coſts are not recoverable in this action. Dyer. 194. a.

Turner *verſus* Davies. Caſe 25.

Paſch. 22 Car. 2. Regis. Rot. 576.

S. C. 1 Mod. 62. 2 Keb 668. An *audita querela* lies to diſcharge a judgment obtained by an adminiſtrator, where, after the judgment, the adminiſtration is repealed.

AUDITA QUERELA by *Turner* againſt *Davies*; the plaintiff declares that one *Edmund Spicer* died inteſtate, and after his death adminiſtration of his goods was committed to the defendant as principal creditor, and the defendant as adminiſtrator, &c. afterwards recovered in this court againſt the now plaintiff 51l. for damages and coſts in an action of trover for the converſion of certain monies of the inteſtate converted by the now plaintiff to his own uſe, and afterwards the adminiſtration of the now defendant upon an appeal to the delegates was repealed, and adminiſtration of the goods of the inteſtate was granted to one *John Spicer* the brother of the inteſtate, by reaſon whereof the now defendant ought not to have any execution on the judgment againſt the now plaintiff, becauſe he is become chargeable to the ſaid *John Spicer* as adminiſtrator, &c. for the monies converted by him, yet the now defendant intends and endeavours to take the now plaintiff in execution on the ſaid judgment for the damages and coſts aforeſaid unjuſtly, and to the great damage of the now plaintiff, wherefore he brought this action.

The defendant appears and pleads in bar that he had recovered the ſaid judgment before he was cited upon the appeal to repeal his letters of adminiſtration, as the plaintiff has alleged, upon which plea the plaintiff demurred in law.

And it was argued by *Saunders* for the plaintiff, that the plea was inſufficient to bar the plaintiff, becauſe the plea contains no more than is compriſed in the declaration, and he argued that here the writ and declaration were good; for it

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appears

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appears fully by the record that the judgment was by the defendant as adminiſtrator for a debt due to the inteſtate, that is, for the value of the goods of the inteſtate which were converted; and though there be now a judgment, and the damages, which were before uncertain, are now reduced to a certainty, yet before execution it is but a *choſe in action*: for if the now defendant had died before his adminiſtration was repealed, his executors or adminiſtrators could not ſue out execution on this judgment, but before the ſtatute 17 Car. 2. c. 8. the adminiſtrator *de bonis non* in all caſes was obliged to commence *a new action*; but now by this act if the judgment is after verdict, the adminiſtrator *de bonis non*, &c. may ſue out execution upon the judgment. But the executors or adminiſtrators of the now defendant, who has ſo recovered the judgment, have nothing to do with it; which proves that the now defendant was only entitled to the monies as adminiſtrator, and not otherwiſe. And now his adminiſtration being repealed, his title is determined, and he ought not any further to intermeddle with any of the eſtate of the inteſtate, for it now belongs to *John Spicer* the new adminiſtrator. And this is matter which the now plaintiff could not plead before in the action of trover againſt him, becauſe it is ſubſequent matter which happened after the judgment, and therefore the plaintiff is now to be relieved by this action; and *Coke*'s Entries, 89. a. and 8 Rep. 144. a. Dr. *Drury*'s caſe, are full to this purpoſe; for the plaintiff in the *auditâ querelâ* in that caſe was in execution at the ſuit of an executor, and afterwards the will was revoked by ſentence in the ſpiritual court; whereupon the plaintiff brought his *auditâ querelâ*, and had judgment to be releaſed out of priſon. Therefore he prayed judgment for the plaintiff here.

In all caſes before the ſtatute 17 Car. 2. c. 8. adminiſtrator *de bonis non* was obliged to begin a new action, but now he may ſue out execution on a judgment after verdict —See ante 72 in the note S. P.

Barrel for the defendant argued, that here was a thing veſted in the defendant which could not be deveſted by the repeal of the letters of adminiſtration; for if the money on the judgment had been paid, or levied by an execution, the defendant would retain them, notwithſtanding the letters of adminiſtration were afterwards revoked, and the now plaintiff would be diſcharged againſt the now adminiſtrator. And although here the defend-

3 Term Rep. 125. Allen v. Dundaſs.

ant has not received the money, yet by the judgment itſelf the property of the goods converted is altered, and the now plaintiff ſhall never be charged again for the converſion of them. And if it ſhould be otherwiſe, and the new adminiſtrator ſhould have an action *de novo* for the ſame converſion, perhaps it might be barred by the ſtatute of limitations, and ſo that part of the inteſtate's eſtate would be altogether loſt. And he ſtrongly inſiſted that here was a duty veſted in the now defendant as adminiſtrator, of a different nature from that which was in the inteſtate, and therefore it ſhould not be deveſted by the repeal of the adminiſtration afterwards, but the now defendant ſhall have it notwithſtanding the repeal of the adminiſtration; therefore he prayed the now plaintiff ſhould be barred.

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Sed non allocatur; for *Kelynge* C. J. ſaid that the law abhors circuity of action (2): and here there will be a circuity of action

The law abhors circuity of action.

(2) If a man, upon the credit of B., lend money to A., which is applied to the uſe of A., but is not put to account by A. upon an account made between him and B, the lender ſhall have an account in chancery againſt A. for avoiding the circuity of action, if he was to be put to his action againſt B. and B. to an action againſt A. Ruled in chancery, and upon an appeal affirmed in the houſe of Lords. Show. Caſ. Parl. 17. So, it is conceived, an action for money lent would now be held maintainable againſt A. for the money which was ſo applied to his uſe. So in covenant the plaintiff declared that the defendant had covenanted with him to collect his rents in C. and aſſigned a breach that the defendant did not collect them. The defendant pleaded that the plaintiff himſelf had interrupted his collecting the ſame. It was inſiſted that the plea was not good; for if it was, the defendant might bring treſpaſs againſt the plaintiff, and recover damages, and therefore it was no plea to this action. But it was anſwered by the court that the plea was good *in avoidance of circuity of action*; for if the defendant ſhould bring treſpaſs and recover damages, then the plaintiff ſhould have an action of covenant againſt the defendant, and recover, which circuity of action the law will not ſuffer Keilw. 34. b. 35. a. So where a man becomes bound to another who covenants not to put the bond in ſuit before *Michaelmas*; and the obligee nevertheleſs brings debt on the bond *before Michaelmas*, the defendant cannot plead the covenant in bar, but muſt have recourſe to an action upon it; but if the covenant had been *not to ſue at all*, it is reaſonable, in order to avoid circuity of action, to allow its being pleaded in bar of the action. And. 307. pl. 316. *Doncſe* v. *Jeffries*. Cro. Eliz. 352.

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action if the now defendant ſhould ſue out execution and receive the money. For it was clear, he ſaid, that the new adminiſtrator would recover it again againſt the now defendant. And therefore to avoid circuity of action, the now plaintiff ſhall be diſcharged againſt the now defendant from the ſaid judgment, and be chargeable to the new adminiſtrator for the value of the goods converted; wherefore it was adjudged for the plaintiff by the whole court.

352. S. C. So where to debt on bond for 200l. the defendant pleaded, that, after the making of the bond, the plaintiff by indenture covenanted, that if the defendant ſhould at ſuch a day pay 100l. the obligation ſhould be void, and alleged that he paid the money at the day; and upon demurrer it was inſiſted for the plaintiff, that the indenture being made after the bond, could not be pleaded in bar; but all the court held that the defendant might well plead it in bar, without being put to the action of covenant by circuity of action. Cro. Eliz. 623. *Hodges* v. *Smith*. So in debt for rent on a leaſe for years, the defendant pleaded in bar, that the leſſor did covenant that the leſſee might deduct ſo much for charges, and upon demurrer this was adjudged a good plea, it being a thing executory, and the covenant *in the ſame deed*, and the party ſhould not be put to circuity of action, and to bring action of covenant. 1 Lev. 152. *Johnſon* v. *Carre*. But it is otherwiſe where the covenant is in another deed, for the laſt deed does not take away the effect of the former; and a ſubſequent covenant cannot be pleaded in bar of a former; but the defendant muſt bring his action upon the laſt indenture, if he will help himſelf. 2 Vent. 217, 218. *Gawden* v. *Draper*. So if A. and B. are jointly and ſeverally bound to H., and H. covenants only with A. that he will not ſue A., this is not a defeaſance, for ſtill there is a remedy on the bond againſt B.; but it is otherwiſe if A. only had been bound, for then ſuch covenant excludes him from any remedy for ever, *to avoid circuity of action*. 2 Salk. 575. *Lacy* v. *Kynaſton*. S. C. 1 Ld. Raym. 690. 12 Mod. 551. It is indeed a maxim in law ſo to judge of contracts, &c. as to prevent a multiplicity of actions; upon which grounds it is that courts do conſtrue expreſs words of covenant into a releaſe. As ſuppoſing the obligee of a bond covenants not to ſue on it, the courts ſay that ſhall operate as a *releaſe*; for if it operated only as a covenant, it would produce two actions. 1 Term Rep. 446. *Smith* v. *Mapleback*.

But a cauſe of action againſt a plaintiff will be no bar to an action by him for avoiding circuity of action, when the recovery in both actions *is not equal*; as in waſte it is no bar, that the plaintiff covenanted to repair, for in waſte the plaintiff is entitled to recover *treble* damages, but the defendant in his action of covenant will only recover *ſingle*. Moor 23. pl. 80. ſee ante 48. in the note (1.)

Benſon *verſus* Welby, late Sheriff of Lincoln. Caſe 26.

Trin. 21 Car. 2. Regis. Rot. 1505.

YORKSHIRE, to wit. BE it remembered, that heretofore, to wit, in *Eaſter* term laſt paſt, before our lord the king at *Weſtminſter* came *Chriſtopher Benſon* by *John Stone* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *William Welby* eſq. late ſheriff of the county of *Lincoln*, in the cuſtody of the marſhal, &c. in a plea of treſpaſs on the caſe, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Yorkſhire*, to wit, *Chriſtopher Benſon* complains of *William Welby* eſq. late ſheriff of the county of *Lincoln* being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, for this, to wit, that whereas one *John Wright* lately, that is to ſay, on the 1ſt day of *Auguſt* in the year of our Lord 1667 at the city of *York* in the ſaid county, by his certain bill obligatory, ſealed with his ſeal, bearing date the ſame day and year, acknowledged himſelf to owe, and be indebted, to the ſaid *Chriſtopher* in the juſt ſum of 166l. of lawful money of *England*, which he undertook and promiſed to pay to the ſaid *Chriſtopher* at or upon the 2d day of *February* next following the date of the ſaid bill, and to the payment whereof well and truly to be made bound himſelf, his heirs, executors, and adminiſtrators in the ſum of 332l. of like money firmly by the ſaid bill (1); which 166l. the ſaid *John* had not paid at or upon the ſaid 2d day of *February* to the ſaid *Chriſtopher* according to the form and effect of the ſaid bill, whereby and by force of the ſaid bill the ſaid 332l. became forfeited to the ſaid *Chriſtopher*; and whereas alſo, the ſaid

Same precedent. 1 Mod. Ent. 136.

J. W. indebted to the plaintiff by a bill obligatory.

(1) It is neceſſary in this action to aver and prove that the plaintiff had a cauſe of action againſt the perſon who eſcaped. If it be not averred, the declaration is bad on demurrer; and if it be not proved as averred, the plaintiff will be nonſuited. 2 Lev. 85, *Gunter v. Clayton*. 4 Term Rep. 611. *Alexander v. Macauley*.

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The plaintiff for the recovery of his debt ſued out a writ againſt the ſaid J. W.

John being in form aforeſaid indebted in the ſaid 332l., he the ſaid *Chriſtopher* afterwards, to wit, in the term of the holy *Trinity* in the 20th year of the reign of our lord *Charles* the 2d now king of *England*, &c. for the recovery of the ſaid 332l. proſecuted out of the court of our ſaid lord the king before the king himſelf at *Weſtminſter*, commonly called the king's bench, in the county of *Middleſex*, a certain writ of our ſaid lord the king againſt the ſaid *John*, directed to the ſheriff of *Lincoln*, by which ſaid writ our ſaid lord the king commanded the ſaid then ſheriff of *Lincoln*, that he ſhould take the ſaid *John*, if he ſhould be found in his bailiwick, and him ſafely keep ſo that he ſhould have his body before our ſaid lord the king at *Weſtminſter* on *Friday* next after three weeks of St. *Michael* then next following to anſwer the ſaid *Chriſtopher* of a plea of treſpaſs, and alſo (2) to a bill of the ſaid *Chriſtopher* againſt the ſaid *John*, for the ſaid 332l. of debt, according to the cuſtom of the court of our ſaid lord the king before the king himſelf to be exhibited, and that the ſaid ſheriff ſhould have there then that writ; which ſaid writ the ſaid *Chriſtopher* afterwards and before the return thereof, that is to ſay, on the laſt day of *Auguſt* in the 20th year aforeſaid at the caſtle of *Lincoln* in the ſaid county of *Lincoln*, delivered to the ſaid *William*, then ſheriff of the county of *Lincoln*, to be executed in due form of law, to the intent that the ſaid *John* by virtue thereof ſhould be taken and arreſted, and on the day of the return thereof in the ſaid court of our ſaid lord the king before the king himſelf ſhould be by virtue of the ſaid writ committed to the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, according to the cuſtom of the ſaid court from time whereof the memory of man is not the contrary uſed and approved of, or elſe ſhould put in, in the ſaid court of our ſaid lord the king before the king himſelf, according to the cuſtom of the ſaid court for the whole time aforeſaid uſed and approved of, ſufficient bail to anſwer the ſaid *Chriſtopher* in the plea aforeſaid (3). And the ſaid *Chriſtopher* in fact ſays, that after

directed to the ſheriff of L.

(2) See ante, p. 52. note (1)

which writ was delivered to the defendant then ſheriff of L. to be executed.

(3) It is holden that the indorſement of *non eſt inventus* on the writ is ſufficient evidence of its having been delivered to the ſheriff in an action againſt him for an eſcape of a perſon taken either on meſne proceſs, or in execution

the delivery of the writ aforesaid in form aforesaid, and before the said day of the return of the said writ, to wit, on the 20th day of *October* in the 20th year aforesaid at the castle of *Lincoln* aforesaid, the said *William*, being then as aforesaid sheriff of the said county of *Lincoln*, took and arrested the said *John* by virtue of the said writ at the suit of the said *Christopher*, and then and there had him in his the said sheriff's custody by virtue of the said arrest; and brought him the said *John* so in his custody to *Ripon* in the county of *York*. Yet the said *William*, then being sheriff of the county of *Lincoln* as aforesaid, contriving and intending wholly to deprive the said *Christopher* of the 332l., and of his remedy for the recovery thereof afterwards, to wit, on the said 20th day of *October* in the 20th year aforesaid at *Ripon* aforesaid, permitted the said *John*, so being in the custody of the said *William* then being sheriff of the said county of *Lincoln*, to go at large wherever he would, and to escape out of the custody of the said *William* then sheriff of the said county of *Lincoln*, (the said *Christopher* then and yet not being satisfied of the said 332l. or any part thereof,) and upon the said writ, on the said *Friday* next after three weeks of St. *Michael*, before our said lord the king at *Westminster*, falsely and fraudulently returned that he had taken the body of the said *John*, which said body he had ready before our said lord the king on the day and at the place in the writ aforesaid contained, as by the said writ he was commanded: whereas in truth the said *William*, then sheriff of the said county of *Lincoln*, had not the body of the said *John* ready before our said lord the king, on the day and at the place in the said writ contained, whereby the said *Christopher* is wholly defrauded of the said 332l., and of his remedy for

Defendant arrested the said J. W. by virtue thereof

Breach.

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But permitted him to escape,

and falsely returned that he had him ready.

ecution; and therefore, as it is not averred in this declaration that the sheriff made a warrant to his bailiff to arrest such person, it is not necessary to prove a warrant by him to his bailiff for that purpose; but the return of *non est inventus* is sufficient evidence against the sheriff that the writ was delivered to him. *Cowp.* 63 *Blatch* v. *Archer*. And for the same reason the indorsement of *cepi corpus, et paratum habeo* on the writ, seems to be sufficient evidence of its having been delivered to the sheriff.

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the recovery thereof: wherefore the ſaid *Chriſtopher* ſays that he is worſe, and has damage to the value of 5col., and therefore he brings ſuit, &c.

Imparlance.

And now at this day, to wit, on *Friday* next after the morrow of the holy *Trinity* in this ſame term, until which day the ſaid *William* had leave to imparl to the ſaid bill and then to anſwer, &c. before our lord the king at *Weſtminſter* comes as well the ſaid *Chriſtopher Benſon* by his attorney aforeſaid, as the ſaid *William Welby* by *Thomas Walpool* his attorney; and the ſaid *William* defends the wrong and injury when, &c. and *prays judgment of the declaration aforeſaid* (a), becauſe he ſays that the declaration aforeſaid, and the matter in the ſame contained, are not ſufficient in law for the ſaid *Chriſtopher* to have his ſaid action thereof maintained againſt the ſaid *William*; to which ſaid declaration the ſaid *William* has no neceſſity, nor is he bound by the law of the land in any wiſe to anſwer; and this he is ready to verify; wherefore for want of a ſufficient declaration in this behalf, the ſaid *William prays judgment of the ſaid declaration*, and that the ſame may be quaſhed, &c.

Demurrer.

(a) See ante, 114 c.

Joinder in demurrer.

And the ſaid *Chriſtopher* ſays, that he, by any thing by the ſaid *William* above in pleading alleged, ought not to be barred from having his aforeſaid action thereof againſt the ſaid *William Welby*, becauſe he ſays that the declaration aforeſaid, and the matters in the ſame contained, are good and ſufficient in law for him the ſaid *Chriſtopher* to have his aforeſaid action thereof maintained againſt the ſaid *William*, which ſaid declaration and the matters in the ſame contained he the ſaid *William* is ready to verify and prove as the court, &c. and becauſe the ſaid *William* does not anſwer the ſaid declaration, nor does hitherto in anywiſe deny the ſame, the ſaid *Chriſtopher* prays judgment and his damages on occaſion of the ſaid premiſes to be adjudged to him, &c.; but becauſe the court of our ſaid lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day therefore is given to the parties aforeſaid before our lord the king at *Weſtminſter* until *Saturday* next after three weeks of St. *Michael*, to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king now here is thereof

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Curia adviſare vult.

not

not yet adviſed, &c. At which day before our lord the king at *Weſtminſter*, (and ſo it is continued from term to term,) come the parties aforeſaid by their attornies aforeſaid, whereupon all and ſingular the premiſes being ſeen, and by the court of our ſaid lord the king here more fully underſtood, and mature deliberation thereupon had, it ſeems to the court of our lord the king here, that the ſaid declaration of the ſaid *Chriſtopher*, and the matters in the ſame contained, are good and ſufficient in law for the ſaid *Chriſtopher* to have his aforeſaid action, maintained againſt the ſaid *William Welby*, for that the ſaid *William Welby* has not pleaded the ſtatute made in the 23d year of king *Henry* the 6th, of bonds taken by ſheriffs for the appearance of priſoners in their cuſtody by virtue of proceſs mentioned in the ſaid act, wherefore the ſaid *Chriſtopher ought* to recover his damages againſt the ſaid *William* on occaſion of the ſaid premiſes. But becauſe it is unknown to the court of our ſaid lord the king now here what damages the ſaid *Chriſtopher* has ſuſtained in this behalf, therefore the ſheriff is commanded that by the oath of good and lawful men of his county he diligently inquire what damages the ſaid *Chriſtopher* has ſuſtained as well on occaſion of the ſaid premiſes, as for his coſts and charges by him about his ſuit in this behalf expended, and the inquiſition which he ſhall thereon make, he ſend to our lord the king at *Weſtminſter* on *Monday* next after three weeks of St. *Michael* under his ſeal, and the ſeals of thoſe by whoſe oath he ſhall take the ſaid inquiſition, together with the writ of our lord the king to him thereof directed: the ſame day is given to the ſaid *Chriſtopher* there, &c. At which day before our lord the king at *Weſtminſter*, comes the ſaid *Chriſtopher* by his attorney aforeſaid; and the ſheriff, to wit, Sir *Philip Mounſton* knt. ſheriff of the ſaid county of *York*, returned a certain inquiſition taken before him at the caſtle of *York* in the ſaid county of *York*, on the 26th day of *July* in the 22d year of the reign of our lord *Charles* the ſecond now king of *England*, &c. by the oath of good and lawful men of his bailiwick, by which it is found that the ſaid *Chriſtopher* has ſuſtained damages on occaſion of the ſaid premiſes, beſides his coſts and charges by him about his ſuit in this behalf

The declaration ſufficient, becauſe the defendant did not plead the ſtatute 23 H. 6. c. 9. of ſheriffs' bonds.

wherefore the plaintiff *ought* to recover his damages.

Writ of Inquiry awarded.

Inquiſition returned.

BENSON v. WELBY.

Final judgment.

expended, to 200l. and for thoſe coſts and damages to 6d. Therefore it is conſidered that the ſaid *Chriſtopher* recover againſt the ſaid *William* the damages aforeſaid, by the ſaid inquiſition above found, and alſo 14l. 19s. 6d. for his coſts and charges by him about his ſuit in this behalf expended, adjudged of increaſe to the ſaid *Chriſtopher* by the court of our [154] ſaid lord the king now here at his requeſt; which ſaid damages in the whole amount to 215l. And the ſaid *William* in mercy, &c.

Caſe 26.

Benſon *verſus* Welby late Sheriff of Lincoln.

Trin. 21. Car. II. Regis. Rot. 1505.

S. C. 1 Vent. 55. 85. 1 Sid. 439. 1 Mod. 33. 57. 2 Keb. 591. 626. 630. 657. 670.

The ſtatute 23 H. 6, c. 9. of ſheriffs' bonds is only a private ſtatute, of which the court will not take notice unleſs it be pleaded.

ACTION upon the caſe by *Benſon* againſt *Welby* late ſheriff of *Lincoln*; the plaintiff declares that one *Wright* was indebted to him in 332l. upon a penal bill obligatory, and for the recovery of the ſaid debt he ſued a writ out of this court againſt *Wright*, directed to the ſheriff of *Lincoln*, returnable on *Friday* next after three weeks of St. *Michael*, by force of which writ the defendant then ſheriff of *Lincoln* arreſted the ſaid *Wright*, and afterwards ſuffered him to eſcape, the plaintiff not being ſatisfied of his debt, and at the return of the writ the defendant falſely and fraudulently returned a *cepi corpus et paratum habeo*: whereas in truth the defendant had not the body at the return of the writ, whereby the plaintiff was defrauded of his remedy for the recovery of his debt, wherefore he brought this action: the defendant demurred in law.

And it was objected for the defendant, that here was an action for a falſe return of a *cepi corpus et paratum habeo*, where ſuch action is not maintainable, becauſe the ſtatute 23 *H. 6. c. 9.* compels the ſheriff to let his priſoner at large upon reaſonable ſureties of perſons having ſufficient within the county, and nevertheleſs the ſheriff ſhall return a *cepi corpus* as before the ſtatute (4). And this was not denied by

(4) See ante, 60.

the court, or by the counſel on the other ſide; but it was argued for the plaintiff, that this was an action for the eſcape of the priſoner, and although a falſe return was alleged, yet it was nothing but ſurpluſage, and ſhould not hurt the action which was good for the eſcape before. And if it ſhould be intended that the plaintiff has brought the action as well for the falſe return as for the eſcape, ſtill the declaration was good for the eſcape, and he ought to have judgment for that; though he ſhould be barred for the falſe return. But ſhould it be intended one way or the other, yet in this caſe the plaintiff ought to have judgment for the whole; for if the defendant would have aided himſelf by the ſtatute, he ought to have pleaded it, and ſhewn that he let the priſoner to bail according to the ſtatute, and ſo would have been excuſed. But now the defendant has demurred generally to the declaration, and ſo has loſt the advantage of the ſtatute, which is a private one, of which the court will not take any judicial notice, unleſs the party ſhews it in pleading, as [155] it has been oftentimes adjudged. And even if the court would take notice of the ſtatute without its being pleaded, yet it does not appear on the record, as it now is, that the defendant has purſued it in letting the priſoner at large *upon ſureties* according to the ſaid act; for the declaration charges him directly with an eſcape, which the defendant has now acknowledged by his demurrer; wherefore judgment was prayed for the plaintiff.

And the court ſeemed to be of different opinions about the declaration, namely, ſome that the declaration was for a falſe return only, and that all the precedent matter was only inducement; and others that the declaration was for an eſcape only, and the other matter was but ſurpluſage, and not material; and a third opinion was, that the action was brought for an eſcape, and a falſe return alſo; but the court did not agree in this matter (5). But the whole court reſolved, that judgment ſhould be given for the plaintiff for

(5) However it ſeems to be a declaration for *an eſcape*; it not being unuſual in this action to add, that the ſheriff returned "*non eſt inventus*," or the like, to the averment that the defendant ſuffered the party to eſcape.

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this cauſe, that the defendant had not pleaded the ſtatute, *and ſhewn the matter of fact:* for it was agreed by the court, that the ſtatute was a private ſtatute of which the court would not take any notice unleſs it be pleaded. But *Twyſden* juſtice ſaid it had been ſettled before that time, that the ſtatute was but a private ſtatute of which the court would not take cognizance without its being pleaded; but if it was now to be ſettled again, he thought it ought to be ruled and ſettled otherwiſe; but the court cannot recede from former reſolutions and judgments (6); and therefore it was adjudged for the plaintiff.—

Jones

(6) The demurrer ſeems to be improper in any point of view, whether the ſtatute be a public, or a private one. For if it were a *public* ſtatute, of which the court was bound to take judicial notice without being pleaded, ſtill the defendant ought not to have *demurred* to the declaration, but ſhould have ſtated thoſe facts which would have brought his caſe within the ſtatute, in the ſame manner as is neceſſary where a defendant protects himſelf under the authority of any other general law, and ſo have ſhewn that he had acted under the ſtatute, and was juſtified by it in letting the priſoner go at large, and yet returning *cepi corpus, et paratum habeo*, which he might well do, though he ſuffered him to go at large. And on the other hand, if it were a *private* ſtatute, the defendant ſhould have *pleaded* the ſtatute, as well as have ſtated the facts which brought him within it. Or, as this was an action on the caſe, the defendant might have pleaded *not guilty*, and given the act and other ſpecial matter in evidence. 1 Sid. 439. 1 Vent. 85. Therefore it appears that the deciſion of the court was right, though one of the reaſons for giving it does not exiſt any longer.

It ſeems not a little extraordinary, that a ſtatute which concerns the adminiſtration of the public juſtice of the whole kingdom, ſhould ever have been conſtrued to be a *private* ſtatute; and indeed ſome very able men particularly *Rolle* and *Glyn*, who were ſucceſſively chief juſtices of the king's bench, were of opinion that it was a general law. 1 Lev. 86. *Bentley* v. *Hore*. There is no wonder therefore, that *Twyſden* J., who was alſo a very great lawyer, diſcovered ſo great a diſapprobation of the authorities in which the ſtatute had been conſidered to be a private ſtatute; but he thought himſelf bound by them againſt his own private opinion and the reaſon of the thing. To be ſure the authorities alluded to by *Twyſden* J. were very ſtrong and difficult to be got over. Thus in Moor 428. *Laughton* v. *Gardner*, an action on the caſe was brought againſt the ſheriff, who returned *cepi corpus et paratum habeo*, whereas in truth he had not the party, wherefore the plaintiff had loſt his ſuit; the defendant demurred, and

it

Jones and *Saunders* with the plaintiff; *Winnington* and *Levinz* with the defendant.

The ſame judgment in the ſame caſe was given in this term between *Parker* v. *Welby*, which is entered Trin. 21ſt of the now king, Rot. 1503.

it was adjudged for the plaintiff, becauſe by the demurrer the ſheriff had confeſſed the falſe return, and the plaintiff's loſs; but if the ſheriff had pleaded the ſtatute 23 H. 6. and ſhewn how he had bailed the party, and took a bond, it ſeemed to *Popham* that the plaintiff would be barred of this action on the plea. Cro. Eliz. 460. S. C.: and Dyer. 119. a. Plow. 65. a. *Dice* v. *Manningham*. 4 Rep. 76. a. b. *Holland*'s caſe. Hob. 13. *Norton* v. *Simme*, are all authorities to the ſame effect. But in ſubſequent caſes theſe authorities have been queſtioned, and at laſt overruled. Thus in 2 Lev. 103. *Oky* v. *Sell*, Lord *Hale* held that the ſtatute was a general law, of which the court would take judicial notice without pleading. In 1 Str. 399. *Mills* v. *Bond*, the court took notice of the act without its being pleaded. And in Doug. 97. *Boyce* v. *Whitaker*, note (12), Lord *Mansfield* aſked, if there was any doubt whether the ſtatute was a public act, and *Davenport*, as *amicus curiæ*, ſaid it had been doubted, and was therefore always ſet out; and ſo certainly is. 3 Lev. 74. *Graham* v. *Cracyſhaw*. And in Bull. *Niſi Pr.* 224. it is ſaid that though it be regularly true, that a private law ſhall not be taken notice of unleſs it be ſhewn, yet it will be otherwiſe in caſe ſuch private law be recogniſed by a public one; for inſtance, the 23 H. 6. c. 9. relative to ſheriff's bonds is a private law, yet the ſtatute 4. Ann. c. 16. having enabled the ſheriff to aſſign ſuch bond, the court muſt take notice of the law that enables him to take ſuch bond. And laſtly, in 2 Term Rep. 569. *Samuel* v. *Evans*, in which all the authorities were cited, it was adjudged that the 23 H. 6. c. 9. relating to bail bonds is *a public act*, and therefore the court will take notice of it, though it is not pleaded.

Caſe 27.

Hunlocke *verſus* Blacklowe.

Eaſter, 22 Car. 2. Regis. Rot. 2880.

S. C. 1 Mod. 64. 2 Sid. 464. 2 Keb. 674.

If a covenant on one part be negative, and an affirmative covenant on the other part be *in conſideration of the performance thereof*, though the negative covenant be broken, yet the affirmative covenant ought to be performed.

DEBT on bond, dated the laſt day of *July* in the 16th year of the reign of the now king, conditioned to perform covenants in articles of agreement. The defendant, after oyer of the condition, ſets out the articles, by which it appears that the plaintiff, being a taylor, had aſſigned his trade to the defendant, and all the benefit of the cuſtomers named in a ſchedule annexed to the articles, and the plaintiff covenants with the defendant, *that he would from thenceforth leave off and deſiſt from uſing and exerciſing the trade of a taylor with any of the cuſtomers named in the ſchedule*, with ſeveral other covenants on the part of the ſaid plaintiff to be performed, and the ſaid defendant, *in conſideration of the performance thereof*, covenants that he will pay the plaintiff 100l. a year during his life by quarterly payments, (1) with divers other covenants

(1) This bond ſeems to be founded on a good conſideration; for though a bond, covenant or promiſe, even on good conſideration, not to uſe a trade *any where in England*, is void, as being too general a reſtraint of trade; yet if ſuch bond, covenant, or promiſe, be not to uſe a trade *at a particular place*, it is good. All. 67. *Frugnell* v. *Goſſe*. For the ſame reaſon it ſeems, that a bond, covenant or promiſe, not to uſe a trade with *particular cuſtomers* by name, if founded on a good conſideration, is alſo valid. All the caſes on this ſubject prior to *Mitchell* v. *Reynolds*. 1 P. Will. 181, are noticed in that caſe. There in debt on bond, the defendant prayed oyer of the condition, which recited, that whereas the defendant had aſſigned to the plaintiff a leaſe of a meſſuage and bake-houſe in L. in the pariſh of St. A. for the term of 5 years; if the defendant ſhould not exerciſe the trade of a baker *within that pariſh* during the ſaid term, or in caſe he did, ſhould, within 3 days after proof thereof made, pay to the plaintiff 50l. then the obligation to be void, and pleaded that he was a baker by trade, that he had ſerved an apprenticeſhip to it, by reaſon whereof the bond was void in law, wherefore he traded, as he well might; and on demurrer, the court was of opinion, that a ſpecial conſideration being ſet forth in the condition, which ſhews it was reaſonable for the parties to enter into it, the bond was good; and that the true diſtinction was not between

covenants on the part of the ſaid defendant to be performed; and the defendant, after he had ſhewn all the covenants, pleads in bar that the plaintiff, after the making of the ſaid articles, to wit, on the firſt day of *Auguſt* in the aforeſaid 16th year at, &c. uſed and exerciſed the art and myſtery of a taylor for and with the ſaid Mr. *Pierrepoint* (namely, one of the cuſtomers named in the ſchedule) for the ſole benefit of the ſaid plaintiff, &c. to which plea the plaintiff demurred in law.

And it was urged by *Saunders* for the defendant, that the words, "*in conſideration of the performance thereof*," make a condition

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between *promiſes* and *bonds*, but between contracts *with* and *without* conſideration; and that wherever a ſufficient conſideration appeared to make it a proper and a uſeful contract, and ſuch as could not be ſet aſide without injury to a fair contractor, it ought to be maintained; but with this conſtant diverſity, viz. where the reſtraint is *general* not to exerciſe a trade *throughout the kingdom*, and where it is limited to a *particular place*; that the former is void, being of no benefit to either party, and only oppreſſive; but the other is good.

The principle of this caſe was afterwards recogniſed and adopted in 2 Str. 739 *Cheſman* v. *Nainby*. 2 Ld. Raym. 1456. 3 Brown. P. C. 349. S. C. So where the condition of a bond was that, in conſideration A. would take B. as an aſſiſtant in his buſineſs as a ſurgeon, for ſo long a time as it ſhould pleaſe A., B. agreed not to practiſe on his own account for fourteen years within ten miles of the place where A. lived, the bond was held good. 5 Term Rep. 118. *Davis* v. *Maſon*. See 1 Brown C. C. 418. *Sloman* v. *Walter*. And where by indenture between A. and B. and C., diſſolving their partnerſhip as ropemakers, A. and B. covenanted to allow C. during his life, two ſhillings on every hundred weight of cordage which they ſhould make on the recommendation of C. for any of his friends and connexions, and whoſe debts ſhould turn out to be good: and that A. and B. ſhould ſtand the riſk of ſuch debts incurred; but *ſhould not be compelled to furniſh goods to any of C.'s connexions whom they ſhould be diſinclined to truſt.* And C. covenanted not to carry on the buſineſs of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted in his or their name, purſuant to the indenture, ſhould be the excluſive property of A. and B.; and that C. ſhould during his life excluſively employ A. and B. and no other perſon, to make all the cordage ordered of him, by or for his friends and connexions, on the terms aforeſaid, and ſhould not employ any other perſon to make any cordage on any pretence whatſoever; it was holden, that the covenant by C.

to

HUNLOCKE v. BLACKLOWE.

condition precedent, ſo that when the plaintiff had broken his covenant by uſing his trade with one of the cuſtomers, the defendant was not bound any longer to pay the 100l. a year to the plaintiff. And here the plaintiff had uſed his trade with one of his cuſtomers before any payment of the 100l. a year became due, and therefore the defendant was diſcharged from the payment of the 100l. a year. And to prove that this was a condition precedent, he cited 3 Leon. 219. *Brocas*'s caſe, where the lord of a manor covenanted to aſſure the freehold to one of his copyholders and his heirs, and the copyholder *in conſideration of the ſame covenant performed*, promiſed to pay a certain ſum of money; and it was adjudged, that the copyholder was not obliged to pay the money until the lord had firſt performed the covenant on his part; but it is otherwiſe, ſays the book, if the covenant on the part of the copyholder had been, in conſideration of the covenant *to be performed*. And here the words are, *in conſideration of the performance* of the plaintiff's covenant, which is as much as to ſay, *in conſideration of the covenant performed*. Wherefore he concluded that here was a condition precedent, which being broken, the defendant is not bound to pay the 100l. a year.

1 Saund. 320. note (4).

Sed non allocatur; for the plaintiff's covenant being in the nature of a negative covenant, namely, that he will not uſe

to employ A. and B. excluſively to make cordage for his friends, and not to employ any other, A. and B. not being obliged to work for any other than ſuch as they choſe to truſt, was not illegal and void, as being in reſtraint of trade without adequate conſideration; for the whole indenture muſt be conſtrued together according to the apparent reaſonable intent of the parties; and the general object being only to appropriate to A. and B. ſo much of C.'s private trade as they choſe to give his friends credit for, ſo much only was covenanted to be transferred: and C. was ſtill at liberty to work for any of his friends, who were refuſed to be truſted by A. and B.; by which conſtruction the reſtraint on C. was only co-extenſive, as in reaſon it could only be intended to be, with the benefit to A. and B.; and therefore the reſtraint on C. could be no prejudice to public trade. 8 Eaſt. 80. *Gale* v. *Reed*. But the defendant, being diſſatisfied with this judgment, was adviſed to bring a writ of error into the Exchequer Chamber; but what became of it the editor has never heard.

his trade with the cuſtomers, if the words *in conſideration of the performance thereof*, ſhould amount to a condition precedent, the plaintiff would never have the 100l. a year during his life, becauſe it is not poſſible for the plaintiff to perform his covenant in his life time; for at any time during his life he may break it, and a negative covenant is not ſaid to be performed until it becomes impoſſible to break it; which [157] impoſſibility can only happen here by the plaintiff's death. And therefore ſuch a conſtruction would entirely defeat the intention of the parties; for it plainly appears that their intent was that the plaintiff ſhould have the 100l. a year during his life, and therefore it is not *a condition*, but the defendant may have *his action of covenant* againſt the plaintiff for breach of the covenant on his part. And although it was urged that the 100l. a year ſhould be paid until the plaintiff has broken the covenant on his part, and no longer, and that ſuch was the true meaning of the parties; and when the plaintiff has voluntarily broken the covenant on his part, he ſeems to be content that the 100l. a year ſhould not be paid any longer, yet this was over-ruled by the court. Wherefore it was adjudged for the plaintiff (2).

A negative covenant is not ſaid to be performed, until it becomes impoſſible to break it.

(2) See 1 Saund. 320. *Pordage* v. *Cole*, note (4.) Gilb. Law of Evid. 194. 1 Str. 569. *Lock* v. *Wright*. Willes's Rep. 146. *Muckleſtone* v. *Thomas*, Ibid. 157 *Acherley* v. *Vernon*, and Mr. *Durnford*'s note (a.) Ibid. 496. *Thomas* v. *Cadwallader*, 2 H. Black. 178. *French* v. *Campbell*, 8 Term Rep. 366. *Glazebrook* v. *Woodrow*, in which laſt caſe the reader will find very material obſervations made on the caſe of *Boone* v. *Eyre* cited in note (4.) to *Pordage* v. *Cole*. See *Peeters*. v. *Opie*. *Poſt*. 350. 352. note (3.) *Holdipp* v. *Otway*, *antea*, 106.

Caſe 28.

Rex *verſus* Stoughton.

Trin. 21 Car. 2. Regis. Roll. 8. among the pleas of the king.

Caption.

Surrey to wit. Otherwiſe, to wit, in the week next after the feaſt of the tranſlation of St. *Thomas* the martyr, that is to ſay, on the 14th day of *July* in the 20th year of the reign of our lord *Charles* the ſecond, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland* king, defender of the faith, &c. at the general quarter-ſeſſion of the peace of our lord the king holden for the ſaid county of *Surrey* (1), at *Guildford* in the ſame county, before *Arthur Onſlow*, *Henry Hildyard*, and *William Elliott* eſquires, and others their fellows, juſtices of our ſaid lord the king aſſigned to keep the peace in the county of *Surrey* aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſame county committed, *John Windebancke* eſq. one of the juſtices of our ſaid lord the king aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſame county committed, with his own hands then delivered into the court of our ſaid lord the king there before the ſaid juſtices a certain preſentment lately made by the ſaid *John Windebancke*, upon his the ſaid *John Windebancke*'s own proper knowledge and view, according to the form of the ſtatute in ſuch caſe made and provided (2). *Surrey* to wit, Be it remembered that at the general quarter-ſeſſion of the peace of our lord the king holden for the county of *Surrey* aforeſaid at *Guildford* in the ſame county, on *Tueſday* in the week next after the feaſt of the tranſlation of St. *Thomas* the martyr, that is to ſay, on the 14th day of *July* in the 20th year of the

(1) See 1 Saund 308. Rex v. Kilderby, note (1).

(2) The words, "*which ſaid preſentment follows in theſe words*, or in "*manner and form following, that is to ſay*," ſeem to be wanting; at leaſt it is the uſual practice now to add them. See 1 Saund. 308. *Rex* v. *Kilderby*, note (2.)

reign

reign of our lord *Charles* the ſecond, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland* king, defender of the faith, &c. before *Arthur Onſlow*, *Henry Hildyard*, and *William Elliot* eſquires, and other their fellows, juſtices of our ſaid lord the king aſſigned to keep the peace in the county of *Surrey* aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſame county committed, came *John Windebancke* eſq. one of the juſtices of our ſaid lord the king aſſigned to keep the peace in the county aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſame county committed, in his proper perſon, and upon his the ſaid *John Windebancke*'s own proper knowledge and view, according to form of the (3) ſtatute in ſuch caſe made and provided, then and

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(3) This was the ſtatute 5 Eliz. c. 13. ſ 9. which continued the ſtatute 2 and 3 P. & M. c. 8.; but theſe, as well as all other ſtatutes relating to the highways in general, were repealed by ſtatute 8 Geo, 3 c. 5. and afterwards reduced into one act of parliament by ſtatute 13 Geo. 3. c. 78. which is now the exiſting law upon this ſubject. The laſt-mentioned act preſerves and enlarges that clauſe of the 5 Eliz., which gave a power to a juſtice of peace to preſent a highway on his own view; for by ſection 24 of the ſaid ſtatute 13 Geo. 3. it is enacted, that "every juſtice of "aſſize, juſtices of the counties pala-"tine of *Cheſter*, *Lancaſter* and *Durham*, "and of the great ſeſſions in *Wales*, "ſhall have authority upon his or their "own view, and every juſtice of the "peace, either upon his own view, or "upon information upon oath to him "given by any ſurveyor of the high-"ways, to make preſentment at their "reſpective aſſizes, or great ſeſſions, or "in the open general quarter ſeſſions "of the peace, of ſuch reſpective li-"mit, of any highways, cauſeway or "bridge, not well and ſufficiently re-"paired and amended, or of any other "default, or offence done contrary to "this act, and that all defects in the "repair thereof ſhall be preſented in "ſuch juriſdiction where the ſame do "lie, and not elſewhere; and no ſuch "preſentment ſhall be removed by *cer-*"*tiorari*, or otherwiſe, out of ſuch ju-"riſdiction, till it be traverſed and judg-"ment thereupon given, except where "the duty or obligation of repairing the "ſaid highways, cauſeways or bridges, "may come in queſtion; and every "ſuch preſentment made upon view, "or information as aforeſaid, ſhall be "as good, and of the ſame force, "ſtrength and effect in the law, as if "it had been preferred and found by "the oaths of twelve men; and that

"for

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and there in the court of our ſaid lord the king, before the ſaid juſtices preſented, that a (4) certain common highway lying in the pariſh (5) of *Stoke* near *Guildford* in the county aforeſaid, leading between (6) the market-town of *Guildford* aforeſaid in the county aforeſaid, and the market-town of *Okingham* in the county of *Berks*, in, through, over and upon a certain

" for every ſuch default or offence ſo " preſented, the juſtices of aſſize, coun- " ties palatine, and great ſeſſions, at " their reſpective courts, and the juſ- " tices of the peace, at their general " quarter ſeſſions, ſhall have authority " to aſſeſs ſuch fines as to them ſhall " be thought meet; ſaving to every " perſon and perſons that ſhall be affect- " ed by any ſuch preſentment, his, her " or their lawful traverſe to the ſaid " preſentment, *as well with reſpect to* " *the fact of non repair*, as to the duty " or obligation of repairing the ſaid " highways, as they might have had " upon any indictment of the ſame pre- " ſented and found by a grand jury."

The words in italics were added to the ſaving clauſe, as it ſtood in the ſtatute 5 Eliz. c. 13. ſ. 9., becauſe it had been doubted, whether under that clauſe the party, againſt whom ſuch preſentment was made, could traverſe the fact *of want of repair*, though the better opinion undoubtedly was that it might be traverſed. Carth. 212. *Rex* v. *Hornſey*, 1 Show. 270. 291. 4 Mod. 38. S. C. 1 Hawk. P. C. c. 76. ſ. 72. 3 Burr. 1530. *Rex* v. *Juſtices of Wiltſhire*.

If an indictment, or preſentment, for not repairing a highway be againſt the inhabitants of a pariſh at large, who are bound of common right to repair all the highways lying within it, they may upon *not guilty* ſhew that it is in repair, or that it is not a highway, or that it does not lie within the pariſh; for all theſe are facts which the proſecutor muſt allege in his indictment, and prove on the plea of not guilty; and it is a well known rule of law, that whatever a plaintiff or proſecutor is bound to prove on the general iſſue pleaded to a declaration or indictment, the defendant may controvert the truth of, by oppoſite evidence. 1 Str. 181, 182, 183. *Rex* v. *Inhabitants of Norwich*.

It is holden that ſuch preſentment may be removed by the proſecutor by *certiorari* before it is traverſed and judgment given thereon. Cowp. 78. *Rex* v. *Bodenham*, agreeable to what had been before determined upon the ſtatute 22 Car. 2. c. 12. ſ. 4. from which that part of the above ſection was copied. 2 Str. 1209. The *King* v. *Farewell*.

(4) Though it is often ſtated in indictments, or preſentments, for nuſances to highways, that " *from time whereof* " *the memory of man is not to the contrary*, " or, *from time immemorial*," there was and is a common and ancient king's highway, yet it is not neceſſary to do ſo; for it has been adjudged that it is ſufficient to ſtate, both in indictments, and in pleas in treſpaſs juſtifying under a right

certain piece of land lying in the parish of *Stoke* near *Guildford* aforesaid in the county of *Surrey* aforesaid, called *Stoke Common*, containing in length (7) 270 rods, being from time whereof the memory of man is not to the contrary a common king's highway for all the liege subjects of our said lord the king, and his predecessors, kings and queens of England, *with their*

a right of way, in a compendious manner, *thus it is a highway* 3 Term Rep. 265. *Aspindall* v. *Brown*.

(5) The highway must be alleged in the presentment, or indictment, to lie in the parish indicted, otherwise it is not bound to repair it; and if it be not so alleged, the indictment or presentment is erroneous, and judgment will be reversed. Cowp. 111. *Rex* v. *Hartford*.

(6) Here the highway is described as leading *between Guildford* and *Cockingham*, so that they are both necessarily *excluded*: so if the highway be described as leading *from* one parish *unto* another, both parishes are excluded. Therefore, where in an indictment against a parish for not repairing a highway, it was stated that, "from "time whereof &c. there was and yet "is a common and ancient king's high-"way leading *from* the parish of H. in "the county of C. *towards* and *unto* "the parish of G. in the county afore-"said, for all the liege subjects, &c. "*and that a certain part of the same* "*king's common highway, situate, lying,* "*and being in the said parish of G.* con-"taining in length, &c. on &c. was and "yet is in great decay;" after verdict for the prosecutor, judgment was arrested, because it was not stated in the indictment that the highway out of repair *lay in the parish of G.*; for the word *unto* the parish of G. excludes that parish according to 2 Roll. Abr. 81. pl. 10. where it is said, that "if A. be "indicted for stopping a highway at "D. leading *from* D. to S, it is not "good, because it is not alleged that "the highway lies in D, for *from* D. "excludes it;" and a parish is only bound to repair, if the highway indicted lies within it; and the court held that this was not aided by the subsequent allegation *that a certain part of the same highway situate, &c. in the parish of G. &c.* is in decay, &c. 3 Term Rep. 513. *The King* v. *Gardinger*. See Latch. 183. *Halsey*'s case. Cas. temp. Hardw. 105. *The King* v. *All Saints in Bristol Mary*. 4 Burr. 2090. *Rex* v. *Barrow*. 5 East, 255. *The King* v. *Stephens*.

However, it does not seem to be at all necessary to state in the indictment or presentment, that the highway leads *from one place to another*, for the highways have no other bounds but the sea; therefore if the *terminus a quo*, and the *terminus ad quem*, are omitted, it appears that the indictment, or presentment, or a plea justifying a trespass because the place is a *highway*, is nevertheless good. Latch. 183. *Halsey*'s case.

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their horſes (8), *carts and carriages* to go, paſs and labour at their pleaſure, on the 5th day of *March* in the 18th year of the reign of our ſaid lord the now king, became, and continually afterwards hitherto was, and yet is very ruinous, miry, deep, broken and in great decay, for want of repairing and amending the ſaid king's highway, ſo that the liege ſubjects

Palm. 389. 2 Roll. Rep. 412. *Nottingham*'s caſe. 1 Str. 44. *Rex* v. *Hamond*. 10 Mod. 382. S. C. 1 H. Black 351. *Rouſe* v. *Barden* & Andr. 145. *The King* v. *Haddock*, in which caſe *Lee* C. J. ſaid, that the objection "that the river T. "where the nuſance was committed, "being a highway, the *terminus a quo*, "and the *terminus ad quem*, ought to "have been ſet out, has been given "up, and not without reaſon; for "it was over-ruled in the caſe of *The* "*King* v. *Hammond*, which was an "indictment for a nuſance in a ſtreet, "and it was objected, that there was "no deſcription of the highway by "mentioning the *terminus a quo*, and "*terminus ad quem*, and 1 Roll. Rep. "was cited in ſupport of the objec-"tion; but the court held that it was "not neceſſary, becauſe highways have "no bounds; and *Parker* C. J. cited "*The King* v. *Thompſon*, 10 W. 3. where "it was ſo determined." And though Mr. Serjeant *Hawkins* ſays (1 Hawk. P. C. c. 76. ſ. 86.) that it is ſafeſt to ſhew both the place *from* which, and alſo the place *to* which the way ſuppoſed to be out of repair doth lead, yet he ſays that exceptions for want of ſuch certainty have ſometimes been diſallowed: and probably he was not aware of the before mentioned caſes of *The King* v. *Thompſon*, *The King* v. *Hamond*, and *The King* v. *Haddock*.

(7). It is ſaid to be neceſſary to allege in the indictment or preſentment to what part of the highway the nuſance complained of does extend, as by ſhewing how many feet in length, and how many feet in breadth, it contains. The reaſon aſſigned is, that, if it be not, the defendant will not know the certainty of the charge againſt which he is to make his defence, nor will the court be able to judge what will be the proper fine to aſſeſs. 1 Hawk. P. C. c. 76. ſ. 88. Caſ. temp. Hardw. 106. *per Lee* C. J. Ibid. 316. *King* v. *Hatfield*. 1 Show. 390. *Rex* v. *Roberts*. But as the court does not at preſent eſtimate the fine from the deſcription of the length and breadth of the road, as ſtated in the indictment, perhaps the want of ſtating it would not now be conſidered as a fatal objection. It has been held that an indictment for a nuſance, that a certain *highway and bridge* are in a ruinous condition, is not bad, for not ſetting out the length and breadth of the nuſance. Say 301. nor for a nuſance in laying ſoil in a highway. Ibid. 98.

(8) The words in italics do not ſeem neceſſary; for where in an indictment for not repairing a highway, it was deſcribed to be a certain common king's highway

ſubjects of our ſaid lord the king, with their horſes, carts and carriages in, through and over the ſaid king's highway, from the ſaid 5th day of *March* in the 18th year aforeſaid hitherto could not, nor yet can, go, paſs, ride and labour, as they were wont and ought to do. And that Sir *Nicholas Stoughton* of the pariſh of *Stoke* near *Guildford*, in the county of *Surrey* aforeſaid, bart. being lord of the manor of *Stoke* in the pariſh of *Stoke* aforeſaid, ought to repair and amend the ſaid common king's highway, as often and when it was neceſſary, by reaſon of the tenure (9) of certain lands, parcel of the ſaid piece

highway called A. leading from B. to C., containing in length ſo much, and in breadth ſo much; after verdict for the king, it was objected in arreſt of judgment, that the deſcription was too uncertain, for it ſhould have ſhewn whether it was a footway, or a way for carts, or for horſes, &c. and ſo were the precedents, as 2 Saund. 158. Tremain, 201. 205. Cro. Car. 266. *Rex v. Ward*, 1 Salk. 359, where judgment upon an indictment for not repairing *occidentalem partem communis pontis pedalis* was reverſed, becauſe *pons pedalis* does not ſignify a foot bridge, but a bridge a foot long, and therefore ſhould have been *pons pedeſtris*; whereas, had the deſcription of it, as *communis pons*, been ſufficient, the court would have rejected the word *pedalis* as ſurpluſage: But the court held the deſcription to be good; for by Lord *Hardwicke*, the length and breadth of the way, and from whence and whither, are neceſſary to be aſcertained in theſe indictments; but I do not remember any authority that holds it neceſſary to ſay, that it is a highway for this or that particular carriage; for if it is a *common highway*, it is a highway *for all manner of things*. Caſ. temp. Hardw. 315. *Rex* v. *Hatfield*.

(9) It is ſaid, that it is not ſafe in an indictment againſt a perſon for not repairing a highway, which he ought to have done in reſpect of the tenure of certain lands, barely to ſay, that he was bound to repair it *ratione tenuræ terræ*, without adding *ſuæ*. 1 Hawk. P. C. c. 76. ſ. 90. But the word *ſuæ* is omitted in this precedent; and it has been held not to be neceſſary; as where in an indictment for not repairing a highway, which the defendant was obliged to do *ratione tenuræ* of a certain houſe, which in another part of the indictment was mentioned to be the manſion houſe of the defendant; it was objected on the authority of 5 H. 7. 3. pl. 8. that the occupier, and not the owner, was chargeable to the repairs of the highway, and therefore the indictment ſhould have been *ratione tenuræ ſuæ*, for it might be that the houſe was let to another, and Latch. 206. *Anon.* was cited. But the court upon conſideration held it not neceſſary to lay it ſo, for *ratione tenuræ* implies it to be ſuch a tenure as makes

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piece of land called *Stoke Common*, containing in length 270 rods, and in breadth 4 rods, lying on the weſt ſide of the ſaid common king's highway ſo as aforeſaid ruinous, miry, deep and in decay, by him the ſaid Sir *Nicholas Stoughton*, on the 25th day of *February* in the 17th year of the reign of our ſaid lord the now king, incloſed and incroached from the

him chargeable; and ſo it was held in 1 Vent. 221. *Rex* v. *Fanſhaw*, which is entered Mich. 29. Car. 2. Roll. 12. There the defendant was charged *ratione tenuræ quorundam terrarum et tenementorum*, and exception was taken for want of *ſuorum*; but the indictment held well enough: but if it were neceſſary to ſay *ſuæ*, the court thought it was implicitly averred by calling it afterwards his manſion-houſe; ſo *quâcunque viâ datâ*, the indictment was well enough. 1 Str. 187. *Rex* v. *Corrock*. It ſeems that the occupier, and not the owner, is the proper perſon againſt whom the indictment ſhould be brought. For how are the public to know who is the owner of the lands charged with the repair? And it does not ſeem to be material what eſtate the occupier has in the lands liable. 1 Salk. 357. *Reg.* v. *Watts, per Powell*, J. 5 Mod. 55. *Queen* v. *Buchnel*.

In many precedents of indictments or preſentments againſt perſons for not repairing a highway by reaſon of tenure, it is ſtated, that the party ought to repair by reaſon of his tenure, *as he, and all thoſe who held the ſaid lands for the time being, from time whereof the memory of man is not to the contrary, were uſed to do*; but it does not appear to be neceſſary to inſert theſe words; for the obligation upon him to repair ſeems to be ſufficiently ſhewn, by averring that he ought to do ſo by *reaſon of the tenure of his lands*, without adding that thoſe who held the lands for the time being have *immemorially* repaired. So in Co. Ent. 358. a. as well as in this entry, it is only ſtated, that the defendant ought to repair by reaſon of the tenure of his lands, &c.: and the very point ſeems to have been decided in Keilw 52. pl 4. in which it is ſaid, that where a perſon is bound to repair a highway by reaſon of tenure, it is not neceſſary either in an indictment, or plea, to allege any title of *preſcription*, becauſe a preſcription is *implied* in the eſtate of inheritance in the land; but where a perſon is bound to repair ſuch a highway by *reaſon of inhabitancy*, a preſcription muſt neceſſarily be alleged, and this difference was admitted to be a good one by the whole court. See 1 Hawk. P. C. c. 76. pl. 8. S. P. It is true however that *Styles* 400. ſeems at firſt view to the contrary; there a motion was made to quaſh an indictment for not repairing a highway upon two grounds; one, becauſe it concluded that the party ought to repair it by *reaſon of his tenements*, which was too uncertain; whereas it ſhould have been, that he and all thoſe whoſe eſtate he has in the tenements uſed to repair it; and the

other,

the ſaid king's common highway, and by him the ſaid Sir *Nicholas* continued to be incloſed and incroached from the ſaid 25th day of *February* in the 17th year aforeſaid hitherto; and which ſaid land ſo as aforeſaid incloſed and incroached, for the whole time aforeſaid until the ſaid 25th day *February*, was parcel of the ſaid common king's highway, and that he the

other, that the indictment ſhould have ſaid, that by reaſon of the *tenure* of his tenements he ought to repair, and not by reaſon of his *tenements*; and for theſe exceptions the indictment was quaſhed But this authority, when it is conſidered, appears to be in favour of the propoſition; for it ſeems clear, that the true way of ſtating the liability to repair on account of lands or tenements is to ſay, that the party is bound to repair by reaſon of the *tenure* of them; and even if it could be laid, that he is ſo bound by reaſon of *his tenements* then it would be neceſſary to allege, *that he, and all thoſe whoſe eſtate he has*, uſed to repair; ſo that either way the indictment was bad. And agreeable to the diſtinction taken in *Keilway* between an obligation to repair by reaſon of tenure and of inhabitancy, it has been holden, that an indictment againſt a *particular part* only of a pariſh, ſuch as a diſtrict, townſhip, diviſion, or the like, for not repairing a highway in the pariſh, ſtating that *the inhabitants* of the diſtrict from time immemorial *ought to repair and amend it*, is erroneous; it ought to have ſtated that the inhabitants of ſuch diſtrict from time whereof, &c *have uſed and been accuſtomed*, and of right ought, to repair and amend it. For the inhabitants of a particular diviſion of a pariſh are not bound to repair by common law, but their obligation muſt ariſe from cuſtom, or preſcription; and therefore the indictment ought to ſhew the cuſtom, preſcription, or reaſon of their obligation. 5 Burr 2700. *Rex* v *Broughton*. S. P. Freem. 522 caſe of St *Andrew, Holborn*. 3 Keb. 301 S. C. 3 Bac Abr. 58. 2 Term Rep 111. *Rex* v. *Sheffield*. But an individual cannot be bound by preſcription, that he and all his anceſtors have repaired a highway or bridge, unleſs it be in reſpect of the tenure of his land taking toll, or other profit; for the act of the anceſtor cannot charge the heir without profit; though a corporation, or a pariſh, or a part of it, may be charged by preſcription to do ſo. 12 Rep 33. 1 Hawk P. C c. 76 ſ 8. 3 Bac. Abr. 58. S. P. Therefore if a pariſh lies partly in one county, and partly in another, and a highway lying in one part is bad an indictment againſt the inhabitants of that part of the pariſh only, ſtating that the inhabitants of that part of the pariſh *ought* to repair, is bad; but the indictment muſt be againſt the *whole* pariſh. 5 Term Rep. 298. *Rex* v. *Cliſton*. 3 Bac Abr. 57 S. P. though the contrary was once held in the caſe of *Rex* v *Wilſon under Penyard* 4 Burr. 2507. And upon the ſame principle it has been decided, that a preſent-

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the ſaid Sir *Nicholas* hath not repaired, or amended the ſaid common king's highway, to the great damage and common nuſance of all the liege ſubjects of our ſaid lord the king, going, paſſing, riding and labouring in, through, over and upon the ſaid king's highway with their horſes, carts and carriages, and againſt the peace of our ſaid lord the now king, his crown and dignity, &c. which ſaid preſentment our lord the now king afterwards for certain reaſons cauſed to be brought before him to be determined, &c. Wherefore the ſheriff of the county of *Surrey* was commanded that he ſhould omit not, &c. but cauſe him to come to anſwer, &c.

And now, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this ſame term, before our lord the king at *Weſtminſter* comes the ſaid Sir *Nicholas Stoughton* by *John Goddin* his attorney, and having heard the preſentment, ſays that he does not ſuppoſe that our ſaid lord the now king will impeach him the ſaid Sir *Nicholas* on occaſion of the premiſes,

ment under the ſtatute 13 Geo. 3. *c.* 78. ſ. 24. againſt a ſmaller diſtrict than a pariſh, muſt ſtate expreſsly *how* the inhabitants thereof are liable to the repair of the roads. 2 Term Rep 513. *Rex* v. *Penderryn.* 5. P. Styles 163. Andr. 276. *Rex* v. *Marton.* Where lands bound to the repair of a bridge, or highway, *ratione tenuræ*, are conveyed to ſeveral perſons, every one of the grantees, being a tenant of any parcel, is liable to the *whole* charge, and muſt have contribution from the others. So where a manor ſo bound is conveyed to ſeveral perſons, a tenant of any parcel, either of the demeſnes or ſervices, is liable to the whole repair, and may call upon the tenants of the reſidue to contribute: and the grantees are chargeable with the repair, though the grantor ſhould convey the lands or manor diſcharged of the repair; and the grantees muſt have their remedy againſt the grantor. And the reaſon ſeems to be, becauſe the whole manor or land, and every part thereof, in the poſſeſſion of one tenant, being once chargeable with the repair, it ſhall remain ſo, notwithſtanding any act of the owner. For the law will not ſuffer him to apportion the charge, and ſo make the remedy for the public benefit more difficult; or, by alienations to inſolvent perſons, to render the remedy againſt ſuch perſons quite fruſtrate. And though ſuch lands, or manor, come into the hands of the crown, yet the obligation or duty continues, and any perſon afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing. 1 Salk. 358. *Reg.* v *Ducheſs of Buccleugh.* See 3 Viner, *Apportionment.* 5. pl. 9.

becauſe,

becauſe, proteſting (*b*) that the ſaid lands, above ſuppoſed to be incloſed and incroached, in the preſentment aforeſaid above as aforeſaid ſpecified or any parcel thereof, were not parcel of the ſaid common king's highway, as is above preſented; and proteſting alſo that the ſaid lands were not, nor yet are, in the tenure of him the ſaid Sir *Nicholas*, for plea the ſaid Sir *Nicholas* ſays, that the inhabitants of the pariſh of *Stoke* near *Guildford* aforeſaid, from time whereof the memory of man is not to the contrary hitherto, have always repaired and amended, and been uſed to repair and amend, the common king's highway, lying in the pariſh of *Stoke* near *Guildford* aforeſaid, leading between the market town of *Guildford* aforeſaid in the county aforeſaid, and the market town of *Okingham* aforeſaid, in, through and over the ſaid piece of land lying in the pariſh of *Stoke* near *Guildford* in the county of *Surrey* aforeſaid, called *Stoke Common*, in the preſentment aforeſaid above ſpecified; without this, that he the ſaid Sir *Nicholas* ought to repair and amend the aforeſaid common king's highway as often and when it was neceſſary by reaſon of the tenure of the ſaid lands parcel of the ſaid piece of land called *Stoke Common*, in manner and form as by the ſaid preſentment is above ſuppoſed. And this he is ready to verify: wherefore he prays judgment if the ſaid lord the now king will any further impeach him on occaſion of the premiſes (10), &c.

(*b*) Ante, 103. note (1).

The pariſh of S. has immemorially repaired the ſaid highway,

and traverſes that the defendant ought by reaſon of tenure to repair it.

(10) It ſeems to have been unneceſſary for the defendant to have pleaded any thing elſe but the general iſſue of not guilty; indeed this plea amounts to no more and is therefore bad, and might have been demurred to; for it appears to be a ſettled rule, that where a perſon is charged with the repair of a highway or bridge *againſt common right*, he may diſcharge himſelf upon *not guilty* to the indictment; and therefore where a particular diviſion of a pariſh is charged with the repair by preſcription, or a particular perſon by reaſon of tenure, or the like, which are obligations againſt the common law, they may throw the burden either on the pariſh, or even on an individual, on the general iſſue. 1 Str. 180. 183. 484. *Rex* v. *City of Norwich*. 3 Salk. 183. pl. 3. *Rex* v. *St. Andrews*. S P. ruled by Lord *Kenyon* in *Rex* v. *Wheaten Aſton, Stafford* Summer Aſſizes 1797. And the reaſon ſeems to be, becauſe upon this iſſue the proſecutor is bound to prove that the defendant is chargeable by tenure or preſcription,

REX v. STOUGHTON.

Demurrer.

And Sir *Thomas Fanſhaw* knt. coroner and attorney of our lord the king in the court of our ſaid lord the king before the king himſelf, who proſecutes for our ſaid lord the king in this behalf, for our ſaid lord the king ſays that the ſaid plea of the ſaid Sir *Nicholas Stoughton* in form aforeſaid above pleaded and the matter in the ſame contained are not ſufficient

and therefore the defendant may diſprove it by oppoſite evidence. However, if they will, though unneceſſarily, *plead* the ſpecial matter, it is held not to be enough to ſay *that they ought not to repair*, but they muſt go further and ſhew *who ought*. 1 Sid. 140. *Rex* v. *Pierſon*. Carth 213. *Rex* v. *Horniſy*. But if an indictment be againſt a *pariſh* for not repairing a highway, as it is an inconvertible rule, that by the general law of the land the pariſh at large is *prima facie* bound to repair all highways lying within it, unleſs by preſcription, or otherwiſe, they can throw the burden on particular perſons; 1 Vent. 189. *Katherin Aſtin*'s caſe. 1 Ld. Raym. 725. *Anon.* 2 Term Rep. 111. *Rex* v. *Sheffield*; it is quite ſettled, that the pariſh cannot do ſo upon the general iſſue of not guilty, but they muſt ſet forth their diſcharge in a ſpecial plea. 1 Mod. 112 *Rex* v. *St. Andrews*. 1 Vent. 256. *Anon.* 1 Hawk. P. C. c. 76. ſ. 9. This obligation on the pariſh to repair is ſo much a matter of general right, that if particular perſons were made chargeable to repair a highway by ſtatute, and afterwards become inſolvent, the juſtices of the peace may put that charge upon the reſt of the inhabitants. 1 Ld. Raym. 725. *Anon.* So no *agreement* with any perſon can take off this charge which the law lays upon the pariſh. 1 Vent. 90. Therefore an indictment againſt an individual, or a corporation, for not repairing a highway which, *by virtue of a certain agreement*, they are bound to do, is bad. 3 Eaſt 86 *Rex* v *The Mayor of Liverpool*. And if the inhabitants of a townſhip, bound by preſcription to repair the roads within the townſhip, are expreſsly exempted by the proviſions of a road act from the charge of repairing new roads to be made within the townſhip, the charge muſt neceſſarily fall on the reſt of the pariſh. 2 Term Rep. 106. *Rex* v. *Sheffield*; but a pariſh is only liable if the road be out of repair, for it is no indictable offence that the road is very muddy, and ſo narrow that people cannot paſs over it without danger of their lives, unleſs it alſo adds that it is out of repair. 2 Ld. Raym. 1169. *Reg* v. *Stratford*.

If a perſon indicted for not repairing *ratione tenuræ*, or a townſhip, or other particular perſons for not repairing by preſcription, plead (though unneceſſarily) to the indictment, and ſhew who ought to repair, as they muſt do, it is neceſſary to *traverſe* their obligation to repair; but if a *pariſh* is indicted for not repairing a highway, or a *county* for not repairing a bridge, and they throw

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cient in law to bar our ſaid lord the king from having the preſentment aforeſaid, wherefore for want of a ſufficient anſwer of the ſaid Sir *Nicholas Stoughton* in this behalf he prays judgment, and that he the ſaid Sir *Nicholas Stoughton* may be convicted of the premiſes in the ſaid preſentment above ſpecified, &c.

the charge upon another, they ought not to traverſe their obligation to repair, for it is a traverſe *of matter in law*, and ſuch traverſe, though very often inferred, is demurrable to, and therefore ought always to be omitted. See 1 Saund. 23 *Bennet* v. *Filkins* note (*).

Where different diſtricts or townſhips of a pariſh have immemorially repaired the reſpective highways lying within them, and a highway in one of theſe diſtricts being out of repair, the pariſh at large is indicted, as it may be, care muſt be taken that this preſcription is pleaded to the indictment; for if judgment be given againſt the pariſh, whether after verdict upon not guilty, or by default, the judgment will be concluſive evidence afterwards that the *whole* pariſh is bound to repair, unleſs fraud can be ſhewn Peake *Niſ. Pri.* 219. *Rex* v. *St. Pancras*. But fraud is only put for an example; for if the other diſtricts can ſhew they had *no notice* of the indictment, the defence having been made and conducted intirely by the diſtrict in which the highway indicted lay without their knowledge or privity, the court will conſider it as being ſubſtantially an indictment againſt that diſtrict, and give the other diſtricts leave to plead the preſcription to a ſubſequent indictment for not repairing the highways in that pariſh. Doug 421. *Rex* v. *Townſend*. 2d edit. *Rex* v *Leominſter*. Hil 40. Geo. 3. K. B. The way of pleading the preſcription ſeems to be, that each diſtrict claiming an exemption from repair, ſhall ſtate in a ſeparate plea to the indictment, "that the pariſh has immemorially been divided into a certain number of diſtricts or townſhips "called A. B C. (naming them), and "that the inhabitants reſpectively of "the ſeveral diſtricts of A and C the "diſtrict in which the highway lies) "have immemorially been uſed and "accuſtomed to repair and amend the "ſeveral and reſpective highways ſituate "and lying in their ſaid reſpective diſ-"tricts, independent of each other, and "that the ſaid part of the ſaid high-"way in the ſaid indictment mentioned "lies in that part of the ſaid pariſh "called the diſtrict of C., and by reaſon "of the premiſes the inhabitants of the "ſaid diſtrict ought to have repaired "the ſame independent of the inha-"bitants of the ſaid diſtrict of A. in "the ſaid pariſh And this, &c. where-"fore," &c. The proſecutor then traverſes the preſcription, and iſſue is taken upon it An iſſue of this ſort was tried before Mr. Juſtice *Heath* and a ſpecial jury at *Hereford* ſummer aſſizes 1800, in *Rex* v *Inhabitants of Leominſter*, and the jury eſtabliſhed the preſcription.

And

REX *v.* STOUGHTON.

Joinder in demurrer.

And the ſaid Sir *Nicholas Stoughton* by his attorney aforeſaid, inaſmuch as the ſaid coroner and attorney of our ſaid lord the king for our ſaid lord the king does not anſwer the ſaid plea, nor in any wiſe deny the ſame, but altogether refuſes to admit the ſaid verification, which ſaid plea and the matter in the ſame contained the ſaid Sir *Nicholas Stoughton* is ready to verify; wherefore he prays judgment, and that he may be diſmiſſed by the court from the premiſes, &c.'

Caſe 28.

Dominus Rex *verſus* Stoughton.

Trin. 21 Car. 2. Regis. Rot. 8. *inter placita regis.*

S. C. 1 Sid. 464. 2 Keb. 665. If a man is preſented for not repairing a highway by reaſon of tenure of lands incroached, the *tenure* ought to be traverſed, and not the *incroachment*.

SIR *Nicholas Stoughton* bart. was preſented at the ſeſſions by a juſtice of the peace on his own knowledge and view, that the highway between *Guildford* in *Surrey*, and *Okingham* in *Berks*, namely, in *Stoke Common*, was very ruinous, miry, broken, and in great decay for want of repair, and that the ſaid Sir *Nicholas Stoughton* ought to repair it by reaſon of the tenure of certain lands, parcel of the ſaid piece of land called *Stoke Common*, by the ſaid Sir *Nicholas* incloſed and incroached out of the ſaid common king's highway, and which from time immemorial hath been parcel of the ſaid highway, and that he had not repaired it, to the common nuſance, &c. which preſentment being removed into this court, the defendant pleaded that the inhabitants of *Stoke* near *Guildford* from time whereof, &c. ought to repair the ſaid highway and traverſed without this that he ought to repair the ſaid highway *by reaſon of tenure:* upon which plea it was demurred in law for the king.

And the objection to the plea was, that the defendant had not anſwered the incroachment, which was the principal matter; to which *Saunders* for the defendant anſwered, that the defendant being charged to repair the highway *by reaſon of tenure*, &c. that was the principal matter which ought to

be

be traverſed; for if the defendant had been chargeable by reaſon of incroachment, he ought not to have been charged by reaſon of *tenure*, &c. but by reaſon of *incroachment* only. REX v. STOUGHTON.

And ſo was the opinion of the whole court. And *Kelynge* chief juſtice ſaid, that if the defendant had incroached on the highway he was thereby chargeable to repair the highway as long as the incroachment continued, but not *by reaſon of the tenure* of the land incroached; for as ſoon as the defendant leaves the incroachment open to the highway again, whereby the incroachment ceaſes, he is diſcharged (*b*) from repairing the highway for the future; but where a man is bound to repair a highway *by reaſon of tenure* of any lands, although he leaves them open to the highway, yet he is always bound to repair the highway; wherefore the defendant here being charged *ratione tenuræ* he was badly charged, for he ought to have been charged *by reaſon of the incroachment* of the ſaid highway; but to this preſentment in the manner it is, the defendant did well to traverſe the *ratione tenuræ*, and could not do otherwiſe (11). Wherefore it was adjudged for the defendant. *Jones* was of counſel for the king. See 1 Roll. Abr. 390. (B). pl. 1. Cro. Car. 366. Sir *Edward Duncomb*'s caſe (12).

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(*b*) Ambl. Rep. 295.

(11) For if he had traverſed that he was bound to repair by reaſon of the incroachment, the traverſe would have been bad, becauſe it would have been a traverſe of a matter, or concluſion of law.

(12) It ſeems to be eſtabliſhed, that if a common highway is ſo foundrous and out of repair as to become impaſſable, or even dangerous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and it makes no difference whether it be ſown with grain, or not. 1 Roll. Abr. 390. (A.) pl. 1. and (B.) pl. 1. 2 Show. 28. *Abſor* v. *French*. Doug. 749. *Taylor* v. *Whitehead*. 3d edit. An incloſure of the highway takes away this liberty and convenience; and for this reaſon it is holden, that if the owner of lands not incloſed next adjoining to a highway, incloſes his lands on both ſides, he is bound to make a *perfect good way* as long as the incloſure laſts; and is not excuſed by ſhewing that he has made the way as good as it was at the time of the incloſure; becauſe if it was then defective the public might have gone on the adjoining land. 1 Roll. Abr. 390. (B.) pl. 1. Cro. Car. 366. *Duncombe*'s caſe. Sir W. Jones, 296. *Henn*'s caſe. Styles, 364. 2 Ld. Raym. 1170. *per Holt* C. J. 1 Hawk. P. C. c 76. ſ. 6.

ſ. 6. 1 Burr. 465. *Rex* v. *Flecknow.* So if one incloſes land on one ſide which has been anciently incloſed of the other ſide, he ought to repair all the way; but if there is no ſuch ancient incloſure of the other ſide, he ought to repair but *half* the way. 1 Sid. 464. *Rex* v. *Staughton.* 1 Hawk. P. C. c. 76. ſ 7.

But where a highway is altered, changed, or incloſed *by a legal courſe*, as by a writ of *ad quod damnum*, or under the authority of the ſtatute 13 Geo. 3. c 78. ſ. 19. the owner of the land is not obliged to repair the new road, unleſs, in the caſe of a writ of *ad quod damnum*, the jury impoſe ſuch a condition upon him, or unleſs the new road lies in another pariſh 3 Atk. 771, 772. *ex parte Vennor.* 1 Burr. 465. *Rex* v. *Flecknow.* So where a highway is incloſed under the authority of an act of parliament for dividing and incloſing open common fields, the perſon who incloſes is not bound to repair it. 1 Burr. 465.

Lanyon *verſus* Carne & al' Executors of Cara.

Caſe 29.

Hil. 19 & 20 Car. 2. Regis. Rot. 1534.

CORNWALL, to wit. BE it remembered that heretofore, to wit, in the term of St. *Michael* laſt, paſt before our lord the king at *Weſtminſter* came *John Lanyon* gent. by *Arthur Painter* his attorney, and brought here into the court of our ſaid lord the king then there his certain bill againſt *Robert Carne* and *Julian Cara* widow, executors of the laſt will and teſtament of *James Cara* lately deceaſed, in the cuſtody of the marſhal, &c. of a plea of breach of covenant, and there are pledges of proſecution, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit: *Cornwall*, to wit, *John Lanyon* gent. complains of *Robert Carne* and *Julian Cara* widow, executors of the laſt will and teſtament of *James Cara* deceaſed, being in the cuſtody of the marſhal of the marſhalſea of our lord the king before the king himſelf, of a plea of breach of covenant, for that whereas on the 12th day of *February* in the 15th year of the reign of our lord *Charles* the ſecond now king of *England*, &c. by a certain indenture made at *Launceſton* in the county aforeſaid, between the ſaid *John Lanyon*, by the name of *John Lanyon* of *Bobreach* in the pariſh of *St. Crett* in the county of *Cornwall* gent. of the one part, and the aforeſaid *James Cara*, by the name of *James Cara*,

Same precedent. 2 Med. Int. 43.

Declaration in covenant againſt executors,

by indenture between plaintiff and teſtator.

Cara of the parish of *St. Levan* in the county aforesaid yeoman, of the other part, (the other part of which said indenture sealed with the seal of the said *James Cara* in his life-time the said *John* here into court brings, the date whereof is the same day and year,) he the said *John Lanyon* for and in consideration of the sum of 240l. of good and lawful money of *England*, to the said *John* by the said *James* in his life-time in hand paid, and secured to be paid, before the sealing and delivery of the said indenture, and also for divers good causes and considerations him the said *John Lanyon* specially moving, had demised, granted and to farm let, and confirmed, and in and by the said indenture did demise, grant, and to farm let, and confirm, unto the said *James Cara* in his life-time, his executors, administrators and assigns, all those messuages, lands, and tenements with all and singular the appurtenances, commonly called or known by the name, or names of *Tredinan*, situate, lying and being in the parish of *St. Levan* in the county aforesaid, and then or late in the tenure and occupation of *William Cara* and *William Baynard*, their assign, or assigns, and lately theretofore demised by *James Trewren* of *St. Creet* aforesaid gent. deceased to one *John Roe* of *Penryn*, together with all messuages, lands and tenements, houses, gardens, meadows, marshes, pastures, feedings, ways, paths, and easements, commons, waters, watercourses, furze and heath, and all other advantages and appurtenances to the said premises, or to any part or parcel thereof belonging, incident or in any wise appertaining (all the tin and toll of tin, and tin works then found or wrought, or which should thereafter be found or wrought, in or upon the premises aforesaid, or any part thereof, with free liberty to dig, undermine and search for tin, and the tin then found to take and carry away with all sorts of carriages, and all the timber-trees of oak, ash and elm, and all other timber-trees whatsoever then growing, or which afterwards should grow in or upon the aforesaid premises, with liberty to cut, fell and carry away the said trees, to the said *John Lanyon*, his executors and assigns always excepted and reserved;) *to have and to hold* all and singular the messuages, lands and tenements aforesaid with the appurtenances,

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Profert.

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Plaintiff demised to testator certain premises,

except as therein excepted.

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appurtenances, and every part and parcel thereof (except as before excepted) unto the ſaid *James Cara*, his executors adminiſtrators and aſſigns, for and during the full time and term of 99 years fully to be complete and ended, if the ſaid *James Cara* and *Julian Cara*, daughter of *Robert Carne* of the pariſh of *Buryan* in the county aforeſaid yeoman, or either of them ſhould ſo long happen to live, the ſaid term to commence and begin upon and after the death of *Sibill*, wife of one *William Cara*, or the ſurrender, forfeiture or other determination, of the eſtate in the premiſes granted by the ſaid *James Trewren* to the ſaid *John Roe*, and not before; he the ſaid *James Cara*, his executors, adminiſtrators, yielding and paying therefore yearly during the ſaid time, *after the commencement thereof*, to the ſaid *John Lanyon* his heirs and aſſigns, the yearly rent of 40s. of lawful money of *England*, to be paid at the four moſt uſual terms, or times of payment of rent in the year, that is to ſay, the annunciation of the bleſſed virgin *Mary*, the nativity of St. *John Baptiſt*, the feaſts of St. *Michael* the *Archangel*, and the nativity of our Lord God, by even and equal portions, and alſo a capon yearly during the ſaid term at the feaſt of the nativity of our Lord God, and alſo yielding and paying yearly, and every year *after the commencement thereof*, out of the ſaid premiſes, the annual or yearly high rent, or chief rent due to the heirs and aſſigns of *Martin Boſſtowe* gent. deceaſed; and alſo yielding and paying 3l. of lawful money of *England*, for the beſt beaſt, for and in the name of a heriot, or farliefe, upon and after the ſeveral deaths of the ſaid *James Cara* and *Julian Cara*, and upon and after the ſeveral reſpective deaths of them, or either of them, and alſo a harveſt-journey yearly in the time of harveſt, with a man, horſe and guide, for the carrying of the grain of the ſaid *John Lanyon* his heirs and aſſigns to his houſe, upon reaſonable notice given to them, as by the ſaid indenture (among other things) more fully appears. And the ſaid *John Lanyon* proteſting, ſays that neither the ſaid *James Cara* in his life-time, nor the ſaid *Robert Carne* and *Julian Cara* after the death of the ſaid *James Cara*, nor either of them, performed, fulfilled or kept any of the covenants, promiſes, or agreements in the ſaid indentur- above ſpecified, on the part of the ſaid

Habendum to the teſtator for 99 years if he and one J. C. ſhould ſo long live

to commence after the death of one S.

Redendum, the rent of 40s. yearly, payable quarterly, and a capon at *Chriſtmas*.

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and alſo the chief rent,

and 3l. for a heriot on the reſpective deaths of the teſtator and the ſaid J. C.

and a day's journey yearly.

James

James Cara to be performed, fulfilled and kept according to the form and effect of the ſaid indenture, in fact the ſaid *John Lanyon* ſays, that after the making of the ſaid indenture, to wit, on the 1ſt day of *October* in the 19th year of the reign of our ſaid lord the now king at *Launceſton* aforeſaid in the county aforeſaid, he the ſaid *James Cara* made his laſt will and teſtament in writing, and conſtituted and appointed the ſaid *Robert Carne* and *Julian Cara* executors of his ſaid will, and afterwards, to wit, on the ſaid day and year died, after whoſe death the ſaid *Robert* and *Julian* took upon themſelves the burden of the execution of the ſaid will; whereupon the ſaid 3l. for the ſaid heriot or farliefe upon the death of the ſaid *James Cara* became due and payable to the ſaid *John Lanyon*, according to the form and effect of the ſaid covenant, yet the ſaid *Robert Carne* and *Julian Cara* not regarding the ſaid covenants and agreements in the ſaid indenture by the ſaid *James* in his life-time on his part made in that behalf, did not pay to the ſaid *John Lanyon* the ſaid ſum of 3l. in the ſaid indenture above-mentioned for a heriot or farliefe on the death of the ſaid *James*, which they ought to have paid him according to the form and effect of the covenant of the ſaid *James* in the ſaid indenture above-mentioned; and ſo the ſaid *John Lanyon* ſays, that the ſaid *Robert* and *Julian* (although often required) have not kept with the ſaid *John Lanyon* the covenant of the ſaid *James* in manner and form aforeſaid made, but have broken the ſame, and to keep the ſame with him have altogether refuſed, and ſtill do refuſe: wherefore he ſays that he is injured, and has damage to the value of 5l. and therefore he brings ſuit, &c.

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Leſſee made his will and the defendants executors, and died,

on whoſe death 3l. was due for a heriot.

Breach.

That defendants have not paid it.

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And now at this day, to wit, on *Thurſday* next after the octave of St. *Hilary* in this ſame term, until which day the ſaid *Robert* had leave to imparl to the ſaid bill and then to anſwer, &c. before our lord the king at *Weſtminſter* comes as well the ſaid *John* by his attorney aforeſaid, as the ſaid *Robert* and *Julian* by *Hugh Gamlyn* their attorney, and the ſaid *Robert* and *Julian* defend the wrong and injury when, &c. and ſay that the ſaid *John* ought not to have or maintain his aforeſaid action thereof againſt them, becauſe they ſay that the declaration aforeſaid and the matter in the ſame contained

Imparlance.

Demurrer.

LANYON v. CARNE & al'.

tained are not ſufficient in law for the ſaid *John* to have or maintain his action againſt them the ſaid *Robert* and *Julian*, to which ſaid declaration the ſaid *Robert* and *Julian* have no neceſſity, nor are bound by the law of the land in any manner to anſwer. And this they are ready to verify. Wherefore for want of a ſufficient declaration in this behalf the ſaid *Robert* and *Julian* pray judgment, and that the ſaid *John* may be barred from having his aforeſaid action thereof maintained againſt them, &c.

Joinder in demurrer.

And the ſaid *John* ſays that he, by any thing by the ſaid *Robert* and *Julian* above in pleading alleged, ought not to be barred from having his aforeſaid action thereof againſt the ſaid *Robert* and *Julian*, becauſe he ſays that the declaration aforeſaid and the matter in the ſame contained are good and ſufficient in law to compel the ſaid *Robert* and *Julian* to anſwer the ſaid declaration, which ſaid declaration and the matter in the ſame contained he the ſaid *John* is ready to verify and prove as the court, &c. and becauſe the ſaid *Robert* and *Julian* do not anſwer the ſaid declaration, nor have any wiſe hitherto denied the ſame, he the ſaid *John* prays judgment and his damages on occaſion of the ſaid premiſes to be adjudged to him, &c. And becauſe the court of our lord the king now here is not yet adviſed what judgment to give of and upon the premiſes, a day is therefore given to the parties aforeſaid before our lord the king at *Weſtminſter* until

Curia adviſare vult.

day next after to hear their judgment of and upon the premiſes, becauſe the court of our ſaid lord the king now here is thereof not yet, &c.

Lanyon *verſus* Carne & al.' Executors of Cara. Caſe 28.

Hil. 19 & 20 Car. 2. Regis. Rot. 1534.

COVENANT by *Lanyon* plaintiff againſt *Carne* and *Cara* executors of *Cara* defendants, the plaintiff declares that by an indenture 12th *February* in the 15th year of the reign of the now king, he demiſed to the teſtator certain lands in the county of *Cornwall*, to have and to hold for the term of 99 years, if the teſtator and one *Julian Cara*, or either of them ſhould ſo long happen to live, and that the ſaid term ſhould begin upon and after the death of *Sibill* wife of one *William Cara*, or the ſurrender, forfeiture, or other determination of the eſtate formerly granted to one *John Roe*; yielding and paying therefore yearly during the ſaid term *after the commencement thereof*, to the plaintiff, his heirs and aſſigns, the yearly rent of 40s. by quarterly payments, and a capon yearly at the feaſt of *Chriſtmas*; and alſo yielding and paying yearly for every year *after the commencement thereof* the chief rent due to the lord of the fee; and alſo yielding and paying 3l. of lawful money of *England* for the beſt beaſt, for and in the name of a heriot, upon and after the ſeveral reſpective deaths of them, or either of them; and alſo a journey yearly in harveſt-time with a man, horſe and guide for the carrying of the grain of the plaintiff to his houſe on reaſonable notice. And the plaintiff in fact ſays, that the teſtator afterwards, to wit, on the 1ſt day of *October* in the 19th year of the reign of the now king, made his will, and the defendants his executors, and afterwards on the ſame day died: whereby 3l. became due to the plaintiff for the ſaid heriot on the death of the teſtator, and the defendants had not paid it, wherefore the plaintiff brought this action: upon which declaration the defendant demurred in law. And the reaſon was becauſe it was not

S. C. 1 Lev. 294. 1 Vent. 91. 1 Sid. 437. 2 Keb. 505. 572. 588. 677.

A leaſe is made to A. for 99 years, if A. and B. or either of them ſhall ſo long live, to commence after the death of C. yielding and paying 3l for a heriot on the reſpective deaths of A and B and A. dies living C. the heriot is of the ſame nature with a rent, and is not payable by the executors of A.

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ſhewn in the declaration that the term granted to the teſtator was commenced at the time of his death by the death of *Sibill Carn*, or otherwiſe. And this caſe was oftentimes argued by *Powlett* for the defendants, and by *Saunders* for the plaintiff.

And, after it had depended for four or five terms, now the juſtices in this term delivered their opinions *ſeriatim*. And *Morton* puiſne juſtice, and *Raynsford* and *Twyſden* juſtices delivered their opinions for the defendants. And they ſaid that the 3l. reſerved for a heriot was of the ſame nature
[166] with a rent, which is to be paid during the term, and not before the commencement of the term, nor after the end of it. And here this reſervation muſt be conſtrued more ſtrongly againſt the reſerver; as in *Dyer* 377. *a.* where a leſſor ſeiſed in fee of a reverſion, expectant on an eſtate for years determinable on the death of the leſſee for years, demiſed his reverſion to a ſtranger for life reſerving rent, *when the reverſion ſhall happen*, to which demiſe of the reverſion the termor for years attorned; and it was reſolved that the leſſor was not entitled to any rent during the continuance of the term for years, for, as is there ſaid, the reſervation ſhall be intended more ſtrongly againſt the reſerver. And to the ſame intent is the caſe of 17 Edw. 2. Fitz. Executors, 112. And that ſuch heriot is in the nature of a rent which ſhall go with the reverſion, they cited the caſe of *Randall* v. *Scory*, Cro. Car. 313. 2 Roll. Abr. 451. (P.) S. C. where it is ſaid that ſuch heriot is diſtrainable. Then if it be in the nature of rent or ſervice, it is payable only during the term as rent is, and not before the commencement of the term as the plaintiff here would have it. And they thought that the intention of the parties was, that the heriot ſhould not be paid unleſs it happened after the commencement of the term; for in the *reddendum* it is ſaid, "yielding and paying therefore yearly during the ſaid term, *after the commencement thereof*, the rent and heriots on the death, &c." which words, *after the commencement thereof*, do not relate to the rent, for the words, *during the term*, had ſufficiently

declared when and for what time the rent ſhould be paid, and therefore the words, *after the commencement thereof*, would be vain and idle to limit the rent; but they have their proper operation as to the heriots: and the ſenſe is that the heriots ſhould be paid on the deaths of the teſtator and *Julian Cara after the commencement of the term*; and the rather becauſe no time is limited when or for what time the annual journey is to be performed unleſs by the words, *during the term and after the beginning thereof*; and therefore they thought that the heriot, for which the plaintiff has now brought this action, was not due or payable by the true intention of the parties, becauſe the teſtator's death was before the commencement of the term; wherefore they concluded for the defendant that the plaintiff ſhould be barred.

Kelynge chief-juſtice *contrà*; and he delivered his opinion for the plaintiff; and ſaid, that it appeared to him clearly, that the heriot in queſtion was payable on the death of the teſtator whenſoever it ſhould happen, either before the commencement, or after the end, of the term. [167] For he ſaid, that the words were expreſs, that the heriots ſhould be paid on the deaths of the teſtator and *Julian Cara*; ſo that whenſoever they died the heriots were payable by expreſs reſervation. And as to the conſtruction that the other juſtices have put, that theſe heriots were in the nature of rent, and ſo payable only during the term, he ſaid there was not any room for ſuch conſtruction, becauſe the words are expreſs; *et quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.* And he cited 5 Rep. 118. *Eldrich's* caſe. And he ſaid that the books which prove that in ſome caſes a heriot reſerved is diſtrainable do not apply to this caſe; for it does not appear here that the plaintiff has any eſtate in reverſion ſo that he can diſtrain for the rent reſerved, and much leſs for the heriots; yet none will deny that he may have an action of debt or covenant for the rent when it becomes due upon the contract, and ſo for the heriots. And he put the caſe that if one demiſe to A. for life, the remainder to B. for life,

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the remainder to C. for life, reſerving a heriot on the death of each of them, now if B. or C. die in the life-time of A., and therefore he who ſo dies never enjoyed the eſtate, without queſtion the heriot is due on his death, and the leſſor may have an action of covenant againſt the executors of the party dying. So if a man ſeiſed of a reverſion expectant on an eſtate for life grants an *intereſſe termini* to A. for 99 years if he ſhould live ſo long, to commence after the death of the tenant for life, reſerving a heriot on the death of A., and he dies in the life-time of the tenant for life, the leſſor is entitled to the heriot reſerved on the death of A. though he never enjoyed the eſtate, becauſe it was the expreſs contract between the parties, *et modus et conventio vincunt legem*: and ſo it is here; and although it ſeems to be a hard caſe that the heriot ſhould be paid before the commencement of the term, becauſe the teſtator, being the leſſee, had not enjoyed the land, nor taken, nor indeed could take, any of the profits of it in his life time, yet he ſaid that at the time of the contract, it was an equal chance whether the leſſee would live ſo long as that the term would commence before his death, or not. And it was his own act to make ſuch a contract; and perhaps if he would not have aſſented to ſuch contract, the plaintiff, being the leſſor, would not have made the leaſe to him; and becauſe the teſtator had aſſented to ſuch contract, the plaintiff, being the leſſor, was induced to grant him a better bargain, and had taken a leſs fine or conſideration
[168] from him for granting the ſaid eſtate, or had reſerved a leſs rent on the leaſe; and this being a matter which was foreſeen by the teſtator at the time of making the contract, it cannot now be ſaid to be a hard caſe, for it is no more than his own contract. And as to the objection raiſed by the other juſtices, that the words, *after the commencement thereof*, ſeem to direct when the heriots ſhould be paid, namely, after the commencement of the term, he ſaid, that if thoſe words had been only in the firſt clauſe of the *reddendum*, there might be ſome colour for applying them to the heriots and all the reſervations in general; but he ſaid

that

that the ſame words are inſerted not only in the beginning of the *reddendum*, but are alſo inſerted in another clauſe in the *reddendum* for the payment of the chief-rent, which, he thought, was a clear demonſtration that the parties have inſerted thoſe words, where they wiſhed to have them inſerted to explain their intention, and have purpoſely omitted them out of thoſe clauſes, where they did not intend ſo to reſtrain the ſenſe to the words *after the commencement thereof*. And as to the clauſe of reſervation of the journies, he ſaid that the law directs when they ſhall be performed, namely, for ſo many years as the term ſhall endure, and no longer; and ſo the words, *after the commencement thereof*, are not to be intended in the clauſe of the reſervation of the journies, becauſe that clauſe is ſufficiently intelligible and certain without them; but the heriots are reſerved to be paid only at a preciſe time which is expreſsly limited on the deaths of the teſtator and *Julian Cara*, which are general and indefinite, and not reſtrained to any certain time. And in this clauſe, the words, *after the commencement thereof*, are omitted, which would have reſtrained the general words, *on the death*, to a certain and definite term, namely, on the deaths happening after the commencement of the term: and this was done on purpoſe by the parties, as he thought, that the reſervation of the heriots, *on the death*, ſhould not be reſtrained to the time which ſhould happen after the commencement of the term; wherefore he concluded for the plaintiff that the action was well brought, and that the plaintiff ought to recover. But notwithſtanding this opinion, it was adjudged for the defendants by the opinion of the other three juſtices (1).

(1) See Com. Dig. *Rent* (B. 9.) *Copyhold* (K. 19.—K. 27.) 2 Lutw. 1366, 1367. *Oſborne* v. *Sture*.

Heriot is defined to be the beſt beaſt, or other thing, due to the lord on the death or alienation of his tenant; and may be due by tenure, which is heriot-ſervice, or by cuſtom. And though it was anciently holden that heriot-ſervice was due only upon the death of a tenant in fee. 21 H. 7. 13. a. 15. a. Bro. *Hariot* 5. which perhaps is the caſe when it is due by tenure created before the ſtatute *quia emptores terrarum*: yet

it ſeems to be now agreed that it may be reſerved on a leaſe for lives, or years determinable on lives, if ſuch heriot be reſerved payable during the term; as where a leaſe is made for 99 years determinable on the death of A. B. and C. reſerving a heriot on the death of each of them; and it is a heriot-ſervice, becauſe the leaſe is not determined, but there is a reverſion to which the heriot-ſervice may be incident. 2 Lutw. 1367. *Oſborne* v. *Sture*. Heriot-ſervice may be recovered either by ſeizure or diſtreſs; but if it be a heriot reſerved upon a leaſe, or by deed *ſince* the ſtatute *quia emptores terrarum* payable by tenant in fee, it is conſidered as rent, and can only be recovered like rent, by diſtreſs, or action of debt or covenant; but cannot be *ſeized*. However it ſeems ſettled, that heriot-ſervice, when *part of the ancient tenure*, may be *ſeized* any where, either in or out of the manor; Plow. 96. a. *Woodland* v. *Mantel*. Moor. 540. *Odiham* v. *Smith*. Cro. Eliz 589. S. C Bro. *Hariot*. 2. 2 Lutw. 1367. *Oſborne* v. *Sture*. Fitz. *Hariot*. 5 1 Salk 356. *Auſtin* v. *Bennet* 1 Show 81. *Parker* v. *Gage*. 3 Bac Abr 52. Willes Rep 192. *Edwards* v. *Morley* Cro Car. 260 *Major* v. *Brandwood*. for the property of the beaſt veſts in the lord immediately on the death of the tenant, and therefore he may ſeize it any where juſt as he may his own property. Plow 96 a *Woodland* v *Mantel*. Bro. *Hariot*. 2. And for this reaſon it is holden that the lord may ſeize a heriot in the hands of the vendee, unleſs the ſale was *in market overt* Kit. 134. b. But no other but the tenant's *own* beaſt can be *ſeized*. Cro. Car. 260. *Major* v. *Brandwood*. Dy. 199. b. pl. 57. Ow. 146. S. P. *per Anderſon*. So where, on a leaſe for three lives, or 99 years determinable on three lives, there is reſerved for an heriot upon the death of each life, *his or their beſt beaſt*, and the leaſe *is aſſigned*, and then one of the lives dies, the beaſt of the *aſſignee* cannot be *ſeized*, though the leſſor may *diſtrain upon the land* for the beſt beaſt of the deceaſed tenant. 2 Roll. Abr. 451. (P.) 2 Lutw. 1369. and the lord or leſſor may *diſtrain* for a heriot *any man's* cattle that are upon the land without the lord or leſſor's default, and retain them until the heriot is paid: or now by ſtatute 2 W. and M. c. 5. ſell them, if not replevied, Cro. Car. 260. Bro. *Hariot*. 6. 3 Mod 231. *Oſborne* v. *Steward*. And therefore he cannot diſtrain for the heriot-ſervice *out* of the manor, or lands demiſed. 1 Salk. 356. *Auſtin* v *Bennet*. 2 Inſt 132 And if the tenant brings replevin, the lord or leſſor may now avow generally under the ſtatute 11 Geo. 2. c. 19. ſ. 22. And it appears by this caſe that an action of debt, or of covenant lies to recover a heriot reſerved upon a leaſe.

With reſpect to a heriot due by the *cuſtom* of a manor, it may be payable on the death of every tenant, of an eſtate of inheritance, or for life or years; 21 H. 7. 13 & 15 Keilw. 80. Bro. *Hariot*. 5. Kit. 133. or at will 2 Bulſ. 196. *Hix* v. *Gardiner*. Or upon the ſurrender or alienation of the tenant 3 H. 6 45 b. Bro. *Hariot*. 8 *Cuſtomes* 2. Kit. 134. b So by cuſtom, ſo much money may be due, or the beſt chattel, *loco heriotti*, and not a beaſt. Kit. 103. a. And as the property of it veſts immediately in the lord on the death of the tenant, or on an alienation by him, the lord may ſeize it

in

in any place, though he cannot diſtrain for it. Keilw. 82. a. 84. b. 167. a. Bro. *Hariot*. 2. 6, 7. 1 Show. 81. *Parker* v. *Gage*. 1 Salk 356. *Auſtin* v. *Bennet*, of courſe he cannot ſeize the beaſt of another. Cro. Car. 260. *Major* v. *Brandwood*.

But a ſeizure for heriot-cuſtom is not within the ſtatute 11 Geo. 2. c. 19. ſ. 22. 2 Wilſ. 28. *Lloyd* v. *Winton*; therefore in replevin, as well as in treſpaſs, if the defendant avows or juſtifies for heriot cuſtom, he ought to allege the ſeiſin of himſelf, and the tenant, the cuſtom for a heriot, the death of the tenant, and ſeizure of the heriot, Co. Ent. 613. a. 2 Lutw. 1309, 1310. *Baldwyn* v. *Noaks*. And it is not ſufficient to allege a cuſtom to take the beſt beaſt, without ſaying, *for a heriot*, or *in the name of a heriot*, Dyer. 199, b. ſee 1 Boſ. & Pull. 282. *Parkin* v. *Radcliffe*. And if the heriot be cloigned ſo that the lord cannot ſeize, he may bring trover or detinue againſt him who detains it. Bro. *Hariot*. 6 9. ſee Gilb. Diſtr. 8—11. 2d edit. 3 Bac. Abr. 48. 50. 51, 52.

THE END OF THE FIRST PART OF THE SECOND VOLUME.

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